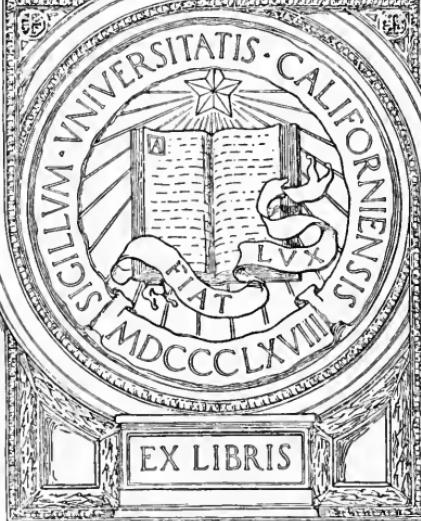


GOVERNMENT AND  
THE STATE  
—  
WOOD

UNIVERSITY OF CALIFORNIA  
AT LOS ANGELES



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# GOVERNMENT AND THE STATE

A CONSIDERATION OF ELEMENTARY PRINCIPLES AND  
THEIR PRACTICAL APPLICATION

BY  
FREDERIC WOOD

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NOTE

THE proofs of this book did not receive the usual "author's reading," owing to the sudden death of Mr. Wood shortly after the manuscript was put to press, and the work has been printed just as it was left by the author.

Frederic Wood was the son of George Wood, a prominent New York lawyer, and himself graduated from the Harvard Law School. While he did not take up the active practice of law, he devoted his life to a study of the general problems of Political Science and in particular of the Science of Government.



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## PART I



## PART I

### GENERAL INTRODUCTION

ANYONE familiar with the polity of The United States of America, a polity in which the Representative System has its largest expression, and in which a certain degree of political work and duty is, in theory at least, assigned to every member of the community, would expect to discover that, of all subjects which attract the interest of humanity, the subject of Political Science would here find its most earnest students. One would expect to find this study pursued to its very furthest development. But the truth disappoints this natural expectation, and awakens the perception that it is perhaps, of all studies, the one most generally neglected. This statement will doubtless be received with amazement and incredulity. Most Americans suppose that politics, the very common topic of conversation, is the one subject they thoroughly understand. Of politics as usually meant, of the details of political party movements, of numerical calculations as to the chances of individual or of party success, of the career of political candidates, there is a very general knowledge; but of politics in a larger sense, of politics as a science, there is a remarkable want of appreciation in the people, an extraordinary lack of knowledge, even among those who perform the role of statesmanship on the legislative and administrative stage. The popular idea of politics may be gained from the popular use of the word. An editorial article of a prominent newspaper mentions a certain important financial

measure then before Congress as a wise one which ought to become an act, and adds: "As there is absolutely *no politics* in it, it is possible that it may be passed."

To many persons the term "Political Science" seems to be considered synonymous with political economy. As a fact, the economic branch of the science is perhaps the least important of all its departments. This mental condition of a people is especially noticeable as the very creation of our Constitution was a work of phenomenal skill possessed by a body of men wonderfully well versed in that science whose study their descendants have neglected. The present condition of political knowledge is, it seems, owing to the system by which political affairs have to the present time been conducted, and to the existence in the American people of a peculiar mental trait.

During the whole period of our Constitutional history there has existed, and there still exists, a strange distrust of such knowledge as is the result of study and special application. The very ancient saying that "knowledge is power" is accepted as true, but with the added belief that in politics such power would assuredly be used to the detriment of the people. That this distrust of scientific knowledge should be among the ignorant classes in the country is not so much to be wondered at as is the fact that a similar feeling prevails among those whose education should have raised them above such prejudice. The common use of the word "doctrinaire" as a term of reproach exhibits this spirit. Immense reliance is placed on common sense. Common sense in the ordinary affairs of life is a very good thing. The every-day physical ailments may be successfully treated by common sense, but when they become serious we are prone to ask the aid of trained medical skill. The prevalence of this sentiment tends to discourage scientific study.

Another cause leading to the same result is the existence of a trait, extremely well marked in the American

people, of astonishing quickness of apprehension and readiness in the adoption of new and untried occupations. This remarkable aptitude naturally fosters an undervaluation of patient study and application, and in all the occupations of life effects an incompleteness and a lack of stability. The reliance on intuitive skill to overcome the difficulties of new positions is fatal to excellence. But there is no hesitancy on the part of most Americans in undertaking any new office without any previous training in its duties. Accordingly we seldom find public offices filled by those who have made statesmanship the study and occupation of their lives. The role is adopted as a companion to other professions, mostly from the distinction it confers, or for the power it endows.

Within a very recent period there has been observed a growing belief that past methods have been erroneous: that excellence in any occupation, however humble or however exalted, is attained only by careful training and study; that in all political affairs the public interests will best be served by those who shall have been carefully trained in the profession they undertake to practise; that ignorance is not a qualification for office nor a guaranty of honesty. To meet this need, the study of political science has recently been introduced into many colleges. But even now there seems to be a tendency to the treatment of special subjects, with an undue prominence in economic matter, rather than to a complete instruction in the science of politics as a whole. In all this there is no disparagement of whatever good work in the political field has been accomplished during the last century of years; but one may safely assert that more might have been accomplished of good, and more of evil have been avoided, by the use of better methods of political practice. Thanks to the structure erected by our fathers, there has been and still is an opportunity, hardly to be found elsewhere, freed as we are from ancient prejudices

and usages, of putting into practice the most highly evolved and perfected of political principles. But the methods must correspond with the principles. Whoever intrudes his views on public notice should justify the intrusion by its supposed need, with the hope that among the many works in the same field the labour of each may contribute to the general purpose.

Before setting forth the scheme on which a science is to be presented, it is useful and instructive to compute the latitude and longitude of that science, to find its place in the system of sciences; more important still, to find out the relationship it bears to its nearest kindred sciences. Between sciences of a certain class there is an interdependence. They mutually assist and explain each other.

Whatever exists and may be the object of scientific investigation is to be found in nature. Human efforts create nothing; they can only combine and utilise existing things. That such efforts may be efficient they must act in obedience to natural laws. The object of scientific research is to ascertain nature's laws and the properties of natural things; and this is the limit of science. Science is the precursor of art, and its director. Art acting alone acts blindly: it may by accident produce a fortunate effect, but it can have no assurance that the end it seeks will be attained. To accomplish the best results science and art should move hand in hand. The term "nature" is by no means to be limited in its signification to material things and the laws which govern them. The intellect with its various properties is a part of nature as truly as are all material objects. Intellectual and moral laws there are as well as physical, and equally within the power of scientific examination. In fact, without the existence of laws all research would be futile. Chance offers no ground for science. Nature presents two grand divisions. In one are all material things. In the other is everything

made possible by the existence of an intellect in man. Corresponding to these are the two branches of physical, and mental or moral science. It is to be regretted that for the latter class there is no distinctly appropriate designation. Physics has been seized upon to describe the science of matter, though etymologically it is much more comprehensive. The terms "moral" and "mental" have each a special signification, the one indicating qualities of right and wrong, the other describing intellectual action. The term "moral" will here be used to comprehend qualities and actions non-physical. On the part of students of moral science a protest against the ways of students of physical science is here appropriate. They have applied in their own sphere words having a more enlarged signification. They claim "science" as their own, and leave to others the vague and unpopular term "philosophy." Physics is nature, and nature is the base of all sciences. There is still another class of sciences termed "abstract," comprehending the idea of individual existences, and of extension, the domain of mathematics; of reasoning in general, the domain of logic; and of possibly the general theory of language. These three classes cover the whole realm of scientific investigation, the abstract, the physical, the moral. Within the last of these Political Science enrolls itself.

The different departments of moral science seem to have been created by a species of evolution in scientific research. The intellect itself, with its properties, powers, and modes of action, gives rise to the science of mental philosophy or psychology. The powers of perception, within the intellect, of right and wrong, of duties and obligations, form the science of moral philosophy or ethics. The necessities of social existence create the science of politics. Man is thus viewed in the three phases of an intellectual being, a moral being, and a social being. These sciences are closely allied. Ethics

depends on the properties of the mind. Politics has its foundation in ethics.

Having placed politics among the sciences, and defined its relative position, the question may properly be asked whether its claim to that position is warranted, whether it deserves the name of science at all. To most persons politics seems so essentially practical in its nature that the term "art" would appear a more precise designation. As has before been pointed out, science and art are so intimately associated that in many cases it is by no means easy to determine the dividing line, not always distinctly marked. To ascertain the justness of the claim, let us consider what that is to which the name "Political Science" is applied.

Absolute isolation is almost an impossibility. It is not good for man to be alone, in any sense of the expression. In such condition his nature is stunted, his powers are undeveloped. Everything points to the social state as that in which man finds the opportunities for the exercise of all his faculties. The apparent paradox is nevertheless true that man in nature is man in society. How the various states of society which we see before us have arisen, it is difficult to know. They come from combinations of circumstances difficult to trace, and impossible to control. However created, of one thing we may be sure, that their sole purpose, the only legitimate and natural one, is to promote the general welfare of those who compose them, and this maxim is true that states of society are entitled to approval or to condemnation exactly as they fulfil or fail to fulfil this purpose. Ascertained purpose furnishes the scientific basis of the study. General welfare is a comprehensive term, and in fact Political Science is a comprehensive subject. Still it is possible to fix a limit beyond which State authority should not extend, or rather to set forth the principles to which in each case the question may be referred. The problem is one

which ages have grappled with. The contest between excessive authority on the one side and popular rights on the other side has always been waged; but it has been an unequal contest. It is a peculiarity of State power that there is no tribunal before which it can be summoned. The wager of battle is the old mode of trial. Injuries are long submitted to before taking this dread appeal. The advantage in the contest is thus always on the side of the present power. It will be the chief glory of modern systems to avert this appeal by appointing a method within their Constitutions for correcting abuses or effecting reform.

The theory of political societies is that the guardianship of the rights which belong to man is deputed to the governing body, that by this means harmony is secured, individual contention is avoided, the weak are protected against the power of the strong, and in fact the general rights are better secured than if left to individual care. In addition certain co-operative advantages are obtained by works of a general character not within individual power to effect. This is what government proposes to itself to accomplish and what it has for ages been doing with varying degrees of success. To determine what are the human rights within the province of the society to protect, the mental and moral constitution of man must be investigated. The intimate association of politics with ethical science is here apparent. Ethics unfolds the rights; but to determine which of them are within the guardian duty of the State, and which of them are clearly without its province, is one of the most difficult problems, —and to this Political Science addresses itself. In all this there is plenty of room for scientific research; but Political Science does not stop here. Having fixed the end to be accomplished, the means is still to be considered. The different systems of government which may exist, the peculiar merits belonging to each, the

union of these merits in another form, the character of the peoples to which governmental systems are applied, the fitness of the instrument to its object, the special study of cause and effect in the results of political measures, all to be studied in strict accord with scientific principles, entitle Political Science to a high rank among the sciences.

History has as many departments as there are topics of human interest. It is to the moral sciences what experiment is to the physical sciences. It furnishes facts from which by induction laws are established, and a test for the verification of theories. The history of communities, their growth, and their form of government, illustrate Constitutional systems. The history of wars, of treaties, of the rise of customs, shows the genesis of International Law. The history of commerce, of finance, and of industrial movements gives a clue to methods of economic administration. The history of judicial and municipal forms enlightens jurisprudence. Psychology is explained by the growth of intellect and modes of thought; ethics, by the growth of morals; ethnology, by the changes and development of races and peoples. It is not alone in the history of the past that Political Science finds its experiments. Modern practices and modern theories are constantly in evidence. There is a clinical study in progress in every parliament, in every executive action.

Wherever the relation of the ruler and the ruled exists, there is the province of Politics. Its scope is so large that it admits of several departments, each of which may be the subject of special study. The first department is that of government in general and Constitutional systems. It considers the purpose of government, the rights of man as affected by the fact of society, the limit of State action and the proper functions of the State, the methods in which those functions may best be performed, the

consideration of different systems of government, and the political adaptation of Constitutional systems to the character and genius of the people to which they are applied. The second department, that of jurisprudence, treats of the rights and duties of the citizens of a State towards one another and towards the State, and of the State towards its citizens, together with the methods of enforcement of such rights and such duties. The third department, that of international law, considers States as entities, and persons only as citizens of a State. In the family of nations the State represents all its citizens. The fourth department is political economy, treating of material wealth and comfort. Political Science regards this only as it affects methods clearly within the scope of State action. These divisions are exhaustive, and are sufficiently comprehensive to engage separate attention. Synthetically they form a body of science through the whole of which there run as guide and corrective the principles of Ethics.

The dignity of a study may be measured by the importance of the ends it is designed to accomplish. A study whose purpose is to maintain ethical rights, to assure the results of labour, to multiply the means of human enjoyment, deserves a high place among the sciences: and these are the objects of Political Science.

The above premises have set forth the character of this important study. The following is an outline of the basis and system on which to construct the science of politics.

Science, as before stated, is an investigation of the laws of nature. Art is action in accordance with those ascertained laws. The laws of man's nature form the subject of the study. From the investigation of man's nature in all its aspects are derived certain rights which come from the need of development of the various faculties with which he is endowed. The rights create the obligation

to maintain them as to oneself, and to respect them in others. Social life is a necessity of man's nature, and of the circumstances of his place in the world. The attrition of social life to a certain extent modifies and limits man's ethical rights, but renders the aggregate of human rights more perfect and better secured than in the solitary condition. From this necessary social life arise nations and states. The care and protection of some human rights are deputed to the governmental authority, and the care of rights so deputed, and as modified by social relations, becomes an obligation, a State duty. What rights are left to individual care and what to the State must depend on the character of the community and of the governmental system, and the degree of advancement which both have attained, but when so deputed their protection is a State duty paramount to all considerations.

## CHAPTER I

### THE REASON FOR EXISTENCE

GOVERNMENT, like all human institutions, must show its title to existence. Whatever is permitted to exist must receive such permission only upon showing a good reason why it should be. The paramount reason is necessity. This one is so obvious and, when admitted, so satisfactory, that it is needless to seek further, although many others to be hereafter adverted to have been alleged.

Individual action looks to one intellect alone for its direction; but whenever several persons are united for a common purpose, there must be some direction to that purpose, and those to whom that direction is entrusted must, within the limits of the authority confided to them, have the power of requiring and enforcing obedience to that authority. This is true of all societies from the smallest to the largest, from those united for the purpose of profit or pleasure to that largest type of community, a nation, whose purpose is, or should be, the general welfare of the community. If the question were asked by any member of a society, no matter what, why the direction of the affairs of the society were entrusted to some only of its members, the answer would be that without such direction harmony could not exist and the purposes for which such society was organised could not be fulfilled; if again asked why the methods by which this governing body should act are prescribed, or why the rulers to whom the government of the society is

entrusted are selected, the answer would be that such methods are supposed to be adapted to carry out the purpose of the society, and that such men or classes of men are supposed to be fitted for its administration. These answers, which must apply to every state of society, would contain the pervading idea of necessity as the reason of the existence of government, but would also prefigure the idea of method and of Constitutions of the governing body. If, then, as must be admitted, a sufficient and satisfactory reason for the existence of government is found in necessity, why consider any other? Simply because the fact may not be overlooked that other reasons have, in the past, been alleged by many philosophers and statesmen.

Political history is full of speculation as to the need and the origin of government. These speculations are not instructive in governmental science, but they are curious and interesting as showing the bent of the human mind in certain directions. Though assuming to be general in their character, these speculations really have been directed toward some special governmental system, either with a view to sustain it or to overthrow it. Naturally these inquiries on this subject have divided into two classes, as the object may be to preserve or destroy.

The starting-point is the relation which exists between the ruler and the ruled. They who desire to strengthen the authority and power of a ruler adopt one view of this relation; and it may be noted that the stronger the opposition to this authority, the stronger is the sanction required. They on the other hand who find a present rule intolerable, and seek a change, view the relation in a different light. The legitimacy of an existing government was supposed to be strengthened by ascribing to it a divine origin, or a divine sanction, by an extension of the patriarchal idea, by conquest and the rights resulting therefrom, by an original grant of authority become ab-

solute. The most effective support of a ruler was the notion of divine right, appealing as it did to the religious feeling of men and sustained as it usually was by the predominant religious establishment. The right of revolt was supposed to be asserted in imagining a compact between the ruler and the ruled, a breach of which compact on the one side would destroy obligation on the other. Whether to support tyranny or inaugurate rebellion, it is thought necessary to satisfy one's conscience, or to exhibit to the world logical reasons for the course adopted. Many of these theories were built upon fanciful notions respecting the origin of government. That some form of government existed wherever any community of men was found is indubitably true. In the rudest tribes of men the functions of government were very limited and its systems simple, the ruler, whether holding his office by usurpation, by force, or by a conviction on the part of the people of his superior qualification for the office, was most probably the one best fitted to perform the simple duties required by the organisation.

This is a far better conception of legitimacy than that expressed in more recent views. The genesis of system it is difficult to trace or an uninterrupted succession difficult to establish. Even supposing them proved, they are useless to support authority. Neither antiquity nor continued succession can give to government a sanction superior to that of purpose and fitness.

Not all political thinkers have been biased in their opinions by a predilection for special forms and by a necessity of justifying such forms. Some have viewed the matter from a broader standpoint, at the same time they have been influenced by the tone of thought which prevailed in the time at which they wrote. The Grecian and the Roman conception of government was more nearly correct than that expressed by writers of the seventeenth and eighteenth centuries. And this fact

may be explained by the historical events occurring between these periods. A disruption of old civilisations, a relapse into semi-barbarism, a gradual development of systems in their new lines, impressed the barbaric notion of right and strength upon the minds of men. A long-continued succession gives an impress of legitimacy. This may account for the tone of thought prevalent until a comparatively recent period, and not yet extinct.

One of the consequences of this notion was that condition of society where the line of division between the ruling classes and the people was distinctly marked, where government and its attendant privileges and means of wealth were considered as property to be contended for by rival States or by factions within States. Such a condition seems a monstrous perversion of right. Its parallel is found to-day in the strife of parties within a State for the acquisition of what is termed power. The word itself indicates the design, which ought to be the ability to establish and conduct a policy and to sustain principles favourable to the common good, but which is the ability to obtain personal profit and party aggrandisement.

The views above alluded to may not be treated as mere idle theories. They must be regarded in the light of their effects. Man is very much governed by theories and precedents. Their consequences may be profitable or disastrous according to the justness of their conception. It is the privilege of the twentieth century to discard all speculations as to the origin of government, or to indulge them only as curious fancies, to find the true *raison d'être* of government in the fact that without it society could not exist nor could civilisation advance, to determine from the nature of man, in his individual and social aspect, what are the true purposes and objects of government, and to ascertain the methods by which those objects may be best accomplished. The right to exist

we have derived from necessity and from that only; the other essential features are to be considered in later chapters. In the meantime it is important to consider on what government acts. It acts on states of society.

Society is a word of comprehensive import. It includes all association of individuals for a specific purpose. Here we are concerned only with societies political, and of them directly with that highest form designated by the term "State." A very extended vocabulary in any language may give to the language a great variety and richness of expression, but that quality is usually purchased at the expense of exactness. To avoid confusion, then, it is essential that where a word may be used variously, its connotation should be carefully fixed for its use in any one treatise. It is believed that the word "State" designating a body of people united for general welfare, and under one government which admits of no superior, accords both with scientific use and with one form of popular parlance. The word "nation" is of almost equivalent import, but it has been suggested that the word also implies the existence of some tie of birth or of common descent, which may not be found among the people as described above by the term "State," and that there are States which are not nations, as instanced by the Netherlands in 1815 and by Austria at the present time. International law, though not in itself a felicitous term, is mostly formed by agreements between sovereign powers, applying to them the term "nations." Yet the criticism on the word seems just, viz., that the word connotes a quality which may not appertain to a sovereign body called a State. The expressions, State power or duty or allegiance, are frequently applied to mere divisions of general government, and properly so, as whatever may be the divisions and subdivisions of governmental functions, there always remains the idea of delegation of authority from, or of ultimate appeal to, a

sovereign body. Precisely in this way may the term be applied to the bodies called States within The United States of America. Within their jurisdiction their acts are acts of State power. As a historic fact some of them were formerly States in the fullest sense; as a present fact they are within the Constitution of The United States.

There is a marked analogy between individuals and states or conditions of society. In the first the co-existence of certain physical, mental, and moral qualities and their interaction form what is termed the character of the individual man. Similarly, communities have a marked and distinctive character. Though composed of an immense number of individuals, differing greatly among themselves, there is a noticeable preponderance of certain qualities which in the aggregate form the character of a people. As expressed by J. Stuart Mill, the simultaneous state of great social facts, as degree of intellectual and moral culture, the state of industry, the existence of classes and their relations, common beliefs on important subjects, aesthetic development, customs, etc., are at least some of the facts which go to form the character of a State, some of the features by which communities are distinguished from other communities. The attempt has been made by some philosophers to explain the development of human character, to ascertain the laws by the operation of which changes in individual character are effected. A similar attempt has been made to ascertain the laws affecting social development, to show how communities have become what they are at any one time, the causes which have produced certain effects in the past and from which similar effects may be expected in the future. These causes are set forth in Buckle's *History of Civilisation*, and form a very curious and instructive study. They are social dynamics. But it is with social statics that governmental science has to

deal. We recognise the fact that the conditions of States are ever changing with advancing civilisation, with a variation in the density of the population, and with a variety of circumstances affecting the character of a people; and the further fact, that the methods of government must adapt themselves to their changing conditions. We admit, also, that governments deal with existing states of society. Hence the importance of studying societies, particularly with regard to the qualities upon the existence and the degree of which the force, the stability, and the methods of government must depend. It may be confidently stated that any absolute Constitution, though founded on the most correct principles derived from the nature of man, would, if applied to any existing society, probably be misapplied. The reason is obvious. There must be a fitness between the instrument and the object. An ideal Constitution is adapted only to an ideal society. It would be the most remote chance that a ready-made Constitution should find a place. The garment must be fitted to the wearer. The phrase, "Who rules o'er free-men should himself be free," though ridiculed by Dr. Johnson, expresses a political truth. Though government is based on scientific principles, as will be shown in the next chapter, yet it is practical in its methods and operates on societies as they are found to be. It is therefore of the highest moment to analyse society in general, to learn the elements of which society is composed, and of any one society to discover the qualities which taken together determine the character of that society—the social ethology.

Ethnography undertakes to trace the progress and changes in the human race from the earliest periods, to note the various types into which, owing to a variety of circumstances, the race has developed, to mark the division and subdivisions which time and circumstances have effected, and finally to map out on the chart of the world

divisions of the human race distinguished from one another by marked features. With the progress of these investigations we have nothing to do, but with its results we have a great deal to do. The ethnological character of a State deserves serious consideration. If we observe two or more States peopled by kindred races or families of races, we may reasonably expect to find a kindred system of government or at least a capacity for the same system, and we may further conclude that a union between such States, or an inter-migration of the people of such States, might take place without doing violence to the general governmental systems under which they respectively exist. On the other hand, between States ethnologically different we may not expect such union. If one State absorbs the other by conquest or otherwise, the stability of the one will be threatened, or the unfortunate condition of subjection will continue as to the other. It is not probable that they will attain that unity of feeling which makes a nation.

Before pursuing further this important subject, it is advisable to advert to a consideration of those qualities in a people upon which the stability and prosperity of a State are dependent.

It has been said that the most important element in a social union is the idea of obedience to government. By this is meant not a blind unresisting submission to arbitrary power, an obedience which results from helplessness, but that which flows from an intelligent appreciation of the needs and requirements of the social union. The qualities by which this form of obedience is obtained are: 1st, the restraining influence of discipline, in the habit of subordinating personal impulses to the ends of society; 2nd, the sentiment of loyalty or allegiance; 3rd, a feeling of sympathy or common interest among the members of a community. These effect cohesion in a State. The first can only be reached by a long course of education

acting on mental and moral qualities fitted to receive it. The second, the sentiment of loyalty or allegiance, is to be found as well among the least commendable as among the highest types of social systems. It may be the strongest support of good government, it may make possible domestic tyranny and foreign exactions. Patriotism, perhaps the most highly extolled of all virtues, is, ethically considered, the most inconsistent of all virtues. It is a thorough abnegation of egoism, it sacrifices natural duties, but its altruism is bounded by geographical lines. Politically it is a powerful factor in State action. Thirdly, a feeling of sympathy among the members of a community cements the union, produces harmony and unity of purpose. These qualities, then, that of subordination of selfish to social interests, recognising the fact that individual rights are best secured within the social organisation, an intelligent sentiment of loyalty, a sympathy of feeling based on similarity of tastes, of habits and modes of thought, form a social character from which the highest political development may be expected.

To recur to the subject of races or families of peoples, it is to be believed that only among kindred peoples can be found that union of qualities which give coherence to a State. A homogeneous community is more stable than a heterogeneous community. That State is the most firmly fixed which is a nation. England is a nation in the fullest expression of the term. Historically it is a composition of peoples, but of kindred peoples. The Angles, the Saxons, the Danes, and the Normans, all were of that branch of the Teutonic race which had its abode in North-western Europe within a limited geographical extent. The Normans in their migration may have acquired somewhat different qualities from those belonging to the parent stock, and as a consequence of this, perhaps, the fusion of the Saxons and Normans required time to effect. But the coincidence of traits

derived from a common ancestry made possible in time a social and political union. Hundreds of years have not sufficed to unite the English and the Irish peoples.

The Dutch have their abode in the same area as that from which come those who have composed what is termed the Anglo-Saxon race. It is not strange, therefore, that when the Dutch settlements in America were incorporated with the English that the union was politically complete. Though in many respects dissimilar, they in the main equally possessed those qualities which fitted them to live under the same political institutions.

The Anglo-Saxon race seems to possess in a marked degree the faculty of political organisation and discipline. This seems especially evidenced in colonial settlements and in migration to a newly opened country. The instinct of organisation among that people immediately asserts itself. Another striking feature is the habit of submission to the authority to which they acknowledge obedience. Both in the Kingly Republic of Great Britain, and in the Democratic Republic of The United States, the will of the majority is submitted to without question when expressed in Constitutional methods. A notable instance of this was shown in The United States in the hotly contested presidential election in 1876. The mode in which that question was settled did great credit to the genius of the people.

In the large divisions of the human species the distinctions are so marked that political union is out of the question. No one could suppose that it would be practical for Great Britain to extend to all the people of India the same governmental system which applies to the British Isles, or that if they were territorially adjacent, union under one governmental system could exist. The lesser divisions of mankind as found in Europe do not of course differ so radically one from the other. But they

do differ, and in just that respect which indicates for each one a different governmental system. The Teutonic branch and the Latin branch differ in temperament, in modes of thought, in tastes, and in customs. We therefore naturally expect and actually find political difference. They may each be approaching the goal of political perfection, but by different paths; it is important that these paths should not intermingle.

If we assume the postulate that homogeneity is essential to cohesion and to the stability of a State, we may also learn this lesson from the study of history and from investigation into the character of different kinds of peoples, that such cohesion can exist only when there is a certain affinity between the peoples composing a State. Heterogeneity is a danger in time of peace, a still greater danger in time of war. Homogeneity is essential exactly in proportion to the degree in which the government of a State approaches the popular form, a form in which the cordial support of the people is requisite for its maintenance. Perhaps the best modern illustration of these principles is to be found in the history of The United States. At the beginning of its national organisation the people of The United States were a homogeneous people, of Anglo-Saxon origin, and with all the traits and distinctive characteristics of that people. Whatever element foreign to that character here previously existed, had been incorporated with the larger body and had lost its distinguishing traits. The national character was complete, and has continued to this day with only such modifications as time, circumstances, and institutions naturally effect. Natural growth continued with but slight accessions from foreign sources, and these were easily absorbed and produced no appreciable effect upon the body of the people. From the year 1847 to the present time the introduction of a foreign element has, though with some fluctuations, been steadily

increasing and has at last become of so great extent that it cannot be disregarded. Whatever consideration this question may receive will apply, not to its material effect, but only in its political and social effects.

There can be no doubt that the presence of a large body of people foreign in sentiment and custom must subject the body politic to a severe strain. Fortunately this distinctive tendency has been averted in great measure by the power of assimilation. The great extent of country has promoted a dispersion of immigrants. Except in large cities they exist either in small detached colonies or have individually mingled with the people of the country. This power of assimilation is more conspicuous in its effect upon the descendants of foreign residents. Owing to education, association, or to that mysterious something called the spirit of the institutions, we find the children and grandchildren of foreigners living side by side with the descendants of those who inhabited the country at its earliest settlement, having common interests, common sentiments, and an equal feeling of loyalty to their common country. This noticeable circumstance has been made possible, as I think, by the fact that heretofore the sources of immigration are found among kindred people, mainly in the Teutonic family, and that the power of assimilation which exists only among such peoples has been at work in a favourable field and among favourable circumstances. The law of race seems to be verified by the observed facts. The Irish people seem to offer a contradiction to this statement. Unquestionably they have within The United States offered at least an exception to this law. This people, possibly from the fact that there is no nationality which it is willing to call its own, has, while cherishing an intense national sentiment, always identified itself thoroughly with the land of adoption.

Within a recent period the condition has changed.

The people of The United States are now confronted by a danger which must be averted, by a menace to the integrity of their governmental system which should be carefully guarded against.

For a long period of time the race quality has operated to confine people within certain nationalities, and it was only by aggression and conquest that intermixture was realised. At the present time there is a tendency to a diffusion of people. Whatever may be the moving impulse, migration is increasing. Naturally its direction is toward those countries in which the greatest amount of material benefit may be expected. Naturally, also, those actuated by such notions are not likely to aid in the political advancement of a country. The volume of immigration to The United States is immense and constantly increasing. It is composed of all sorts and conditions of men. The Teutonic family no longer furnishes the great army of immigration. It is recruited from the Latin and the Slavonic branches, and even from many peoples not of the great Aryan race. Can this army of occupation, composed of the most incongruous material, ever be welded into a homogeneous mass? It has not entered upon the territory by force, it has come by invitation, given with the view of obtaining some purely material advantages from its presence.

The character of the people in some parts of The United States has been modified by immigration to such extent that the old rule as to freedom of speech seems to require modification. The right of assembly and of free expression of opinion has been allowed, trusting that the good sense of the people would not pervert it, or that revolutionary and fanatical harangue would have no influence on the assemblage. Recently it is observed that such speech acting on persons unaccustomed to political freedom incites to outrage. Economic questions are not within the limit of this consideration; but it is safe to

assert that economic benefits may be dearly purchased at the cost of political degeneration.

The absorbing force which heretofore has had so beneficial effect may be powerless when applied to different material. The government of The United States, like every government of a popular nature, is unfitted to deal with subordinate classes. For its full development it demands the united action of a homogeneous people. If the contiguous territory of Mexico should, for instance, be annexed, with its population foreign in every sense to the nature of the American people, its incorporation would be a risk, its state of dependency would be a contradiction to the system. For similar reasons the African race offers a problem of difficult solution. If held subordinate, it creates an incongruity; if elevated, it may demand a social recognition injurious to both races.

These dangers are here mentioned, not with a view of suggesting the manner in which they should be met, but as an illustration of the relations which exist between kinds of people and governments. That they must be met and averted is evident. Neither sentiment nor material advantage should imperil the integrity of the Republican system. The right of self-preservation appertains to States as well as to individuals.

Before leaving for the present the subject of immigration, it is proper to acknowledge the purely political benefit which it has conferred. The United States narrowly escaped destruction from the force of a political idea encouraged and fostered for many years for personal and sectional aggrandisement, a narrow conception opposed to the broader and grander conception of a united nation and a State. To this first conception immigration opposed itself. In Alexander Johnston's *History of the United States* are to be found these reflections upon the political effects of immigration: "Its best part was a

powerful nationalising force. It had not come to any particular State, but to The United States. It had none of the traditional prejudices in favour of a State, but a strong feeling for the whole country." It is difficult to trace with accuracy the causes of effects. It is possible that this force, strengthening an existing sentiment, and foreshadowing its enlarged extension, may have precipitated the contest. There is no doubt that it was a powerful aid in the conflict between these opposing ideas. Thus far, that force which might naturally be supposed to have a denationalising influence has been acting in an opposite direction, but we may not expect that the same results may be witnessed in the different phase in which immigration now exhibits itself.

The opportunities for applied governmental science are probably better now than ever before. States have heretofore advanced by slow steps, though their disruption has been more rapid. Nevertheless there have been some sudden and beneficent changes in Constitutions, noticeably that effected in England in 1688. In more recent times new Constitutions have been created, as that of The United States in 1789, and of the present government of France in 1875, the establishment of the German Empire, and the extension of one governmental system to the whole of Italy. Upon the soundness of their systems the welfare of the countries must depend. There can be no question, then, of the value of the study, nor of its practical importance. Perhaps its most valuable, because its most constant, use is found in its application to ever-changing social conditions. Civilisation and governmental science move with equal steps, and are mutually assistant. A highly developed governmental system is adapted only to a highly developed social system. While the principles of right are ever the same, they can find their full expression only in favourable circumstances, or rather their methods of

application are dependent upon the social conditions to which they are applied.

The topics thus far considered are the true reason for a State's existence, a consideration of which is made necessary by the fact that a false conception of its authority leads to an incorrect notion of its just power, the conditions of existing societies and their character, the influence of race upon social conditions, the capacity for assimilation between families of people within a State. In the next chapter an attempt will be made to ascertain the true purpose and ends of government and the basis on which governmental systems should rest.

## CHAPTER II

### PURPOSE OF EXISTENCE

ALL social unions exist for a definite purpose, usually distinctly set forth at the time of incorporation. Necessarily, therefore, the administration of the affairs of each society must be limited and directed by the purpose for which the society is organised. That particular form of social union which is designated by the word "State," is governed by the same law of purpose which applies to every other social union. It is only by recognising the fact of a distinct object to be attained, and of the need of a fit instrument for its attainment, that governmental science is a possibility. The State, though agreeing with all other social bodies in its subjection to this law, differs from them in the definiteness of its purpose, and in its method of creation. It is not the privilege of Political Science to create anew, to form an organisation whose methods are carefully adjusted to the object. It must reform and improve, not create. It must find the purposes of government by the general study of man individually and in societies. It is but seldom that governmental systems in their entirety are constituted anew. Constitutions may be organised, but are usually applied to existing social systems, in great measure adopting or modifying existing laws and customs. Social conditions, as found at any one time, are the product of gradual growth and development.

Gregariousness is a law of animal nature. Solitary life is not congenial to man, nor can his full faculties, his

powers of enjoyment, or his material comforts be found in such condition. Men are mutually dependent. The inadequateness of the earth to furnish subsistence to man individually, makes necessary a certain co-operation. For such beneficial purposes societies exist, but their progress is in certain lines and by the operations of certain laws. We may speculate as to their growth, and call in the aid of ethnography. We may imagine a sparsely settled tract where individual freedom has its largest expression. Next appears the family. The parental and filial relations, continuing for a longer period in man than in other animals, create a sentiment of lasting nature, and constitute the binding force of family. The extension and ramification of family form tribes, which further develop intonations. The migration of peoples and, as a consequence, their subjection to numerous influences effect a differentiation of peoples, and explain social states as found to be at any historic period.

Along with the growth of States there goes a growth of government. The patriarchal or family rule is probably the earliest. With the extension of societies, that form would naturally be displaced by some other better fitted to the requirements of an enlarged society. Society and its rule advance together. There is evolution in both, leading to present conditions. Between social and political conditions there seems to be an interdependence. A certain social state may give rise to a peculiar political system; political institutions long continued modify the character of a society. There is an interaction, but it would seem that the influence of social conditions on government is larger than that of government on social conditions. Some of the most active influences operating upon societies are those of race, of political institutions, of religion, and of intellectual development. Many others, even those of a physical nature, are enumerated

in works devoted to the study of the subject. The importance of this teaching to Political Science, the lesson to be learned, is the effect of political institutions on the body of the people, and the capacity of a people to receive a certain development of political system.

In noting the progress of government from its early to later stages, one important fact makes itself apparent, that it mainly takes the direction of increase in the authority and power of the ruler, with a corresponding diminution of personal freedom. A movement in the opposite direction is usually abrupt and violent. This course is natural and may be expected from increase of population within certain geographical limits. A greater density of population implies a greater concession of personal freedom, and an increase of State power. But such increase of power is not hurtful if the proper balance between the two is preserved. There is in all States and at all times a constant conflict between personal freedom and State control. The adjustment of the balance is the most difficult problem with which Political Science has to contend.

The tendency of modern times, influenced by the progress of knowledge and a more enlightened understanding of moral and social laws, is towards a diminution of the ruling power. In former times the tendency has been towards diminution of personal freedom and towards enlargement of authority. Many causes have operated to this effect. The history of the human race is unhappily mostly a history of war. In popular histories wars have a most conspicuous place; in fact they are mainly the material of which such histories are composed. In philosophical history their influence on states of society cannot be overlooked. They tend to effect unity and cohesion. For the prosecution of warfare, whether for aggression or for defence, discipline, subordination, authority, are essential. Autocratic systems are well adapted

for warfare. Democratic systems are ill-prepared for war, not adjusted to its prosecution. The consolidation of peoples is effected by the union necessary to resist aggression. Personal rights are surrendered in aid of defence. Militarism then projects itself into civil life, and the military system becomes the type and model of the civil system. Following in its train come class distinctions and consequent degradation of the multitude.

Whether to accelerate or to retard this movement, the influence of race makes itself felt. There exists in some peoples a quality which makes submission easy, which lends itself to autocracy. In others there is a quality which resents subjection. A type of the former is found in Eastern peoples, of the latter in Western nations, in the Teutonic race, and is more strikingly exemplified in the Anglo-Saxon branch. In this people there is a fondness for personal liberty, a jealousy of State encroachment. Though in a measure compelled to succumb to the pressure of circumstances, there is a constant effort to return to popular forms. When freed from the trammels of custom, as in the settlement of new countries, this tendency is strikingly exhibited. There seems not to have been in Western nations a complete submission to the State of the power to redress wrongs. As late as the year 1818 an appeal to wager of battle was made and allowed in English jurisprudence. The duel is a survival of the personal-protection system derived from a condition of things when State control was limited. Originally an advance on barbarism, by reducing quarrels to a system, its present justification is supposed to lie in the power to punish wrongs which the State does not redress. It is a solecism at the best, as the punishment becomes a matter of chance, or a question of comparative skill between the culprit and the executioner. Eastern civilisation and Western civilisation seem to move in contrary

directions, the one to autocracy, the other towards personal freedom.

If, then, as is unquestionably true, the progress of society obeys certain laws, although those laws are difficult to ascertain,—if peoples and social conditions and governments are what they are from the operation of physical and mental laws not subject to human control, the question naturally arises: Where is the place for the application of the truths of Political Science? How can it be made to operate on uncontrollable conditions? The best answer is the consideration of the scope and object of the science. Before addressing ourselves to this matter, it is important to consider one of the facts of social development whose influence has not been sufficiently appreciated, namely individual human action.

All agree in admiration of those whom the world calls great men. Yet it is questionable whether the estimate placed upon them has usually been just. It is not always the most conspicuous characters in history whose influence upon human progress has been the most beneficial. By the results of their labours they must be judged, whether they have accomplished directly, or have paved the way to future accomplishment of, works by which human life has been prolonged or made more comfortable, suffering been mitigated, just rights been enforced, or in fine the physical, intellectual, or moral improvement of humanity been effected; or whether, on the contrary, progress has by them been stayed or direct evils inflicted. In politics, the systems of laws established by Justinian, by Alfred, and that inspired by Napoleon, all have served the cause of political development. There can be no doubt that the strength, the firmness, the lofty moral tone of Washington, and the respect and veneration which his character inspired, contributed largely to the inauguration of a new system, from the example of which many nations have profited.

Great men all have their place: for good or for evil, their actions have an important bearing on civilisation. But it would be a grave mistake to suppose that of all human actions it is to the great alone that human progress is indebted. Individual actions, however insignificant, count for something in the general progress: great forces are often the sum of smaller forces, or a great resultant force may be the composition of smaller ones. The moral lesson to be derived from this fact is that in every action each should strive to do well what he undertakes to do; the political lesson, that the aggregate of human work regulates social movements. Even here it may be asserted that we are under the reign of law, that everyone acts as he does in obedience to the laws of his nature, laws which exist, but which it is impossible to trace, which are too recondite to be made available. Whatever the truth may be as to the existence or operation of such laws, practically they are disregarded. The discussion about necessity and free-will may go on unheeded. In all our relations to human beings we assume, not equal physical and mental powers, but the ability to do or not to do any specific act. Matters may not be left to the direction of fate; responsibilities cannot thus easily be shifted; the obligation to act according to one's powers, and thus perform one's part in the world's work, may not be avoided. Alfred the Great said, "Every man must say what he says and do what he does according to his ability."

While the human world moves on, influenced by laws of which human actions form a part, but which they cannot directly control, the study of human progress affords evidence of the means by which science must act to accomplish its purpose. Governmental science acts in two ways, deductively as to its purposes, inductively as to its methods. In its design to maintain human rights and to enforce human duties, it discovers the rights and duties

by a study of the human constitution. In the methods of accomplishing the desired results it studies the operation of laws and institutions upon human societies. History affords the experimental ground on which the causes of effects and the effects of causes may be observed. In pursuance of this system the first effort to be made is to determine what government undertakes to do, what are the purposes of its existence. The whole of man's nature indicates the possession of certain rights and of certain duties flowing from such rights, that each individual acting for himself alone is the sole guardian of such rights, that self-interest, avariciousness, and various other evil passions of man's nature would lead to incessant conflict, oppression of the weak by the strong, and the evils which necessarily flow from such a condition. Society recognises the fact that individual assertion results in turmoil, and that amidst turmoil human happiness cannot be obtained, nor can human faculties attain their best development. Society, then, to a certain extent, relieves individuals of the duty of self-protection, and, according to determined methods, assumes that duty itself. Again, society discovers that by co-operation better effects are obtained than by single unaided work. It makes a distinction, however, between such works as concern the individual directly and such as interest the community and in which there must be unity of action. Society also discovers a tendency in some to assert their individuality to greater degree than is consistent with the safety of the community and to rebel against the laws which the community has enacted. As such conduct would result in a disintegration of the community, force must be applied to compel obedience. Now it is evident that as soon as force is applied, as soon as a voluntary submission to rule ceases, the question must arise whether or not such compulsory submission is an undue interference with human freedom, whether humanity has lost or gained by the

existence of the particular form of government to which this question is applied. This question must be met whenever it arises, and should never be avoided. It is a constantly recurring question, the ever-present test of system, one with which every society at any time is liable to be confronted. The answer to this question is not to be found in the degree of popular objection to a system. The character of the opposition would affect its validity. If possible to outline the answer, it might be stated in a twofold aspect,—Does the government in question undertake to fulfil its proper and legitimate functions? Is it properly adjusted to execute such functions?

The obligation imposed upon the governing department of a society imparts a reciprocal obligation on the part of each member of the society, the obligation of support and allegiance. There is a supposititious compact between each individual and the whole body of society,—of obedience, on the one hand, to that particular system of government which the society in question has adopted; of protection, on the other hand, of acknowledged rights of individuals. This view of an imaginary compact has nothing in consonance with the former view of the relations of the State and the people. If that is rightly understood, the State was regarded as an entity whose existence was a vested right and to which was attached power and privilege. The right of rule was an ancient established right, with whose creation the people had nothing to do, but to which submission was due as to a distinctly constituted power. When to the relation between the people and the ruler the notion of contract was applied, it was as a contract between two independent bodies. Unlike all other contracts, it was supposed to be terminable by one alone of the parties. Its termination by the people for what was thought a just reason necessarily resulted in the destruction of the ruling body,

and was to be followed by probably another contract with another more trustworthy body. The modern notion of the State is different. The government is supposed to be constituted within the society for a distinct purpose usually set forth in general terms. It is supposed to represent the whole society. Its functions are measured by the objects for which the society exists. The fact of its possessing a compelling force does not militate against this idea. The notion of compact only sets forth the reciprocal obligations of the State and the citizen. The ancient conception of contract is foreign to the modern idea, of government being a system established within the society itself of administering the affairs of such society according to the purpose for which it was constituted.

In very few cases is it possible to go back to the origin of a State to seek for its purpose; nor is it necessary to do so. We cannot fail to recognise the reason why States should be, in the general welfare of the members of the community. This very general statement may be made more definite by dividing the functions of a State into two, still general, clauses, as before mentioned; —the defence and maintenance of such of the rights belonging to human beings as may properly be within the care of the State; and, secondly, the performance of public works in which the community as a whole is directly interested, and which may not properly be left to individual care. Measured by their relative importance, the first-mentioned class of State functions is paramount, the second is subsidiary and should never be allowed to contravene the first. What are the rights which belong to man as man? is the question which ethics undertakes to answer. But it is not with all ethical rights that the State is concerned, only with such as the State within its legitimate province undertakes to maintain, and as to them modified by the conditions of social existence.

Such may be termed Political Ethics, or the ethical department of social structure. They are the foundations on which governmental science is constructed, the ultimate test to which questions of State action must be submitted. To be more explicit, wherever the propriety of measures can be submitted to this test, it must be supreme. If this is so, the determination of politico-ethical rights deserves the most careful study. They will form the topic of the next chapter.

The above presentment of the true end and purpose of government is believed to be correct. Upon the correctness of the assumption depend consequences for good or for evil. Very different views respecting the purpose of government have formerly been held, which followed to a logical conclusion have been disastrous in their effects. Even if the true functions of government were distinctly proclaimed, it is not to be supposed that all States could immediately adjust their organisations in conformity with such correct principles. But we have a right to expect change and progress, and it is possible to point out the true direction in which progress should travel. The old contest will continue for a long time to come. Autocracies and paternal governments may limit human freedom and dwarf human powers; excessive democratic ideas may diminish security and tend towards anarchy. Between these extremes is safety attainable only by the approach of societies towards the true principles on which all States should be founded. If these principles can be carefully determined and distinctly enunciated, they will furnish the goal which all States should attempt to reach.

## CHAPTER III

### THE ETHICAL BASIS

If the legitimate purposes of government may be classified into, first, the maintenance of rights of the individual members of a State to the extent to which they are submitted to State control, and second, the execution of certain works of a public character, it is necessary to ascertain, as nearly as may be, what are those rights, and again, what are those works which the State may perform without a violation of individual rights.

The first question comes within the domain of Political Ethics. Whatever may be the general meaning of that term, it is here limited, or extended as it may be, to such ethical principles as are closely connected with political theories and political actions. That any other meaning may be attached to the term is not clear. There can be but one standard of moral quality. Persons in their public relations do not escape the ordinary moral obligations, nor are new ones created. Thus far ethics forms the basis and groundwork on which political structures are founded. In all departments of political science it furnishes the starting-point and the corrective of political questions. All legal rights may be more or less directly referred to ethical principles. Without considering the whole of ethics, so much of that science as serves to fix and establish the rights which are within the province of the State to maintain, and the duties which it undertakes to enforce, should be the object of special study.

If ethics serves as a guide to what is termed moral conduct, the moral quality attached to the notion of conduct is to be ascertained by determining the correlative notion of rights and duties. It has been asserted that the idea of rights is derived from the idea of duties. This seems an inversion of the true order of development. So far from its being a true statement of the case that rights are based on duties, the contrary seems to be the case. If duties have any ground on which they can be based, the only basis is that of determined rights. It seems impossible to affix a moral quality to conduct in a purely abstract manner. Such attribute is without support; there is nothing to which the test of moral quality may be applied. If, on the other hand, we assume the idea of duty to be either active or passive, either a positive maintenance of rights or an abstaining from infringement of rights, there is a natural and logical process by which the moral quality of actions is established. The opposite course is a reasoning in the air. Duties are determined without adequate support, and, together with rights supposed to flow from them, depend only on a shadowy foundation. Rights and duties are correlative, but duties are based on the existence of rights, and rights imply corresponding duties flowing from them.

Assuming this view to be correct, it becomes necessary to learn what are those rights which belong to human beings as human beings. This is established by an analysis and close study of the human constitution in all its varied properties. Whatever this study shows to be necessary to the proper development and sustenance of humanity becomes a right—right to the proper maintenance of all the faculties with which human nature is endowed. Properly regarded rights and duties work together in perfect harmony. The spirit of Christianity does not imply a conflict between these two notions. It is a perfect system of justice, regarding both the rights

of self and the rights of others. It does not inculcate as duty self-renunciation to the extent of encouraging in others undue assertion. It recognises the possession of rights with the privilege, and, in fact, the duty of maintaining them, at the same time limits self-assertion within just bounds, and above all enforces a due regard for the rights of others. Christianity truly understood is in accord with, and at the same time is an exponent of, the true Ethical theory.

In proceeding to ascertain the rights appertaining to humanity by a close study of the human constitution, we assume as a general premise that all the powers and faculties with which man is endowed by his constitution, in all its departments, are rights to the use of which every human being is entitled. This flows naturally from the eternal fitness of things, from the notion that the gifts of creation are intended for use. From this conception follows the idea of duty, which is the obligation to develop and give proper action to the faculties with which the individual is endowed: (1) physically, to so order conduct that the physical nature may develop and strengthen, and its powers be exercised to maintain their natural status; (2) mentally, that the mental faculties may have a condition of healthfulness; (3) morally, in the formation of character. The faculties with which man is gifted are in a measure within his control. By diligent care they may be improved; by neglect and abuse they may be wasted or destroyed. The harmony of existence, even life itself, depends on the proper care of the many faculties which constitute life. It may be, and it has been urged, that as the individual receives his powers for his own use they may be treated as his own property which he is at liberty to use or neglect. This negatives the idea of duty—that with rights and privileges there must be a corresponding obligation. It overlooks the further fact that the abuse of one's own

faculties may injuriously affect the rights of others. "Self-love is not so vile a sin as self-neglect."

The duties thus derived may be considered subjectively or objectively. In the former sense, duty follows in the lines already pointed out. Applied to the physical nature, it requires due care in the culture and use of the bodily organs and a restraint of physical enjoyment within proper bounds. It demands a care of the mental faculties, a control of the passions and emotions together with a cultivation of the æsthetic feelings. Above all it demands as a culmination of duty, its highest development, the formation of character. As this is concerned with all classes of duties, its consideration may be deferred until a reference is had to the second class of duties, viz., the objective.

The obligation necessarily imposed on individuals in reference to their fellow-beings is negative and positive —negative in the sense that the rights above mentioned as appertaining to individuals should be secure from disturbance or abridgment on the part of others. But the positive idea of objective ethical duties arises from the mutual dependence which must exist between man and man. The relations existing within a community are numerous. The filial relation implies the right of care and protection on the part of the child, and the corresponding duty on the part of the parent. The relation of the sexes imposes certain duties in accordance with the differences of their constitution. A larger development of human society increases the variety of the relations and enlarges the mutual dependence necessary to the existence of society. Each must contribute towards the welfare of others by division of labour,—hence the duty to perform those offices which one has undertaken to the best of one's ability, that others may benefit by their due performance or may not suffer by their neglect. Herein lies the notion of the obligation of contracts. Mutuality

enters largely into the consideration of this class of ethical duties. A further extension of the idea of mutual aid and dependence results in acts of benevolence and charity.

Between the subjective and the objective ethical ideas there may be a conflict. The duty of self-care and preservation may be subordinated to actions benefiting others, and *vice versa*. There may also be a conflict between the objective duties. Some may be magnified at the expense of others. How to establish harmony between various duties is not easy to determine. May not a method be found in development of character? Moral character has its basis in the idea of duty following from the existence of right. Theories of right and wrong as obtained from observation of the results of action are inadequate to explain the moral sense. The intelligence to perceive such notions does not necessarily include the disposition to obey them, if impulses to the contrary exist. An intellectual conception of duty may not suggest subjective imperativeness. But in a highly developed moral character the sense of obligation is paramount. Whence comes this sense of moral obligation? Spencer derives it from the abstract idea of right together with the idea of coerciveness attaching thereto, obtained from the analogy with penalties affecting other acts. The ultimate effect of acts is contrasted with their immediate effect,—hence the idea of obligation in general apart from that connected with immediate acts. A cultivation of this idea results in habit and in formation of character. Given the idea of imperativeness of moral duty in general, particular conduct is determined by its coming within the sphere of this law. Spencer states the apparent paradox "that the sense of duty or moral obligation is transitory and will diminish as fast as moralisation increases," meaning evidently that habit and character have made performance of duty a pleasurable act, and as such done without conscious reference to the moral idea.

The moral sense has not disappeared, it has become interwoven with the character.

The different departments of the human constitution are so closely allied that different factors go to the making of character, and seem to explain its diversities in mankind. They are, first, the physical nature, giving greater or less strength to desires; second, the intellectual faculties, giving the power to perceive and to understand moral qualities, the power of will to control impulses and to direct actions, and the greater or less strength of the emotions; third, heredity, which explains variety in physical, intellectual, and moral capacities; fourth, education, whereby the faculties have been disciplined and improved, or may have been perverted. With the existence of the moral faculty is the power of improvement. When man has arrived at the stage when conduct is within his control, the duty of developing his moral nature begins. The character of a people is the aggregate of human character composing that people. National character is that on which specific government acts; it gives the clue to the quality of government applicable to a specific people. Rights thus derived have, as to the individual, somewhat of the features of property, not, as has before been noticed, in an unlimited sense, with absolute control, but subject to the duties which flow from their possession, thus having somewhat of a sacred character,—rights which each individual may protect, which others should respect.

In the State the individual cedes the right, and the State accepts the duty, of protection. Ethics thus becomes the basis of Political Science in all its departments, the ultimate reference which determines not only what are rights, but also whether State actions based on mere convenience are in contravention of them. Two important questions here assert themselves. The first, to what extent may the State assume the protection of in-

dividual rights, and how much, on the other hand, may be left to the control of the individual. A nice adjustment of these duties is perhaps the most difficult and at the same time the most important problem of Political Science. This question is properly considered under the title of the Limitations of State Power. The second is how far the rights appertaining to man as man are modified by the fact of communal existence. To this question the rest of this chapter is addressed.

There can be no doubt that in properly constituted States the rights of man, though limited to a degree, are on the whole far better maintained than in a state of nature. The safeguards furnished by the State are their protection. Some modification of natural rights there must be. The necessary conflicts and the attrition of individuals seem to effect a limited reduction of freedom. Yet not only the greatest good of the greatest number, but also the greatest good of individual man, is best found within the State. In order to observe the effects of communal existence upon admitted ethical rights, it is necessary to consider them in detail. Naturally the most important right which appertains to man is that of existence. One would suppose that no abridgment could justifiably be made, yet it may be endangered in the common defence,—life itself may be destroyed as the only effective punishment for certain offences. Whatever theories as to punishment may have been held, there probably is no doubt that the only correct one is that of prevention, not of course direct prevention, which is impossible, but indirect prevention, effected by the knowledge that crime will be followed by punishment. This destruction of life may be justified as the only deterrent of crimes directed against human life. In this manner the State protects life, and as a further protection punishes, though in a different manner, certain degrees of negligence which tend to endanger life. Incident to life

is personal security, freedom from assault and injury. This right may also be properly restricted by risk necessarily incurred in defence of the State. The right of mental and moral safety, including the rights of opinions and expressions, religious beliefs and observances, as to which the action of the State is merely negative, may be modified by the condition that those expressions and observances do not, as to one, unjustly affect similar rights in others. As to religious beliefs, regard must necessarily be had to the predominant religious notions of the community and to their possible conflict with settled moral and political ideas. The right of property, or of acquisitions made by labour, physical or mental, may be limited by restriction in use as affecting the public health or comfort, by the rule of eminent domain, by restriction as to wills, or by limitations of patents and copyrights. Marriage may be restricted by considerations of age, of physical conditions, of relationship, etc. The relation of parent and child may be modified by considerations as to period of pupilage, and by requirements of education. These subjects in detail belong properly to the department of jurisprudence. They are here mentioned to illustrate the statement already made that what we term natural rights may be limited by the necessities of communities.

The degree of liberty which may be granted or denied to individuals will depend on the peculiar conditions of each case in question, upon the peculiar system of government, upon the character of the people to whom that system is applied. There must be a proper adjustment between these two conditions. Fully realising this fact, therefore, it is a matter of the highest moment to take care that the character of a people be not altered by injudicious admission of foreigners and an unwise extension of political privileges. A lack of care in this respect may result in a want of harmony between the people and the

system, in a deterioration of the people, in a consequent deterioration of the system. The most perfect and the most highly developed governmental system is that in which the largest degree of personal liberty is allowed consistent with the maintenance of ethical rights, and this fortunate condition is only attained when the character of the people makes such a condition possible.

All these limitations are directly in line with ethical principles. Their purpose is not an abridgment of ethical rights, but only such a modification as makes them, in the main, more perfect, more secure. In no condition of human existence can human rights be so well guarded as in a well constituted State. That a State may be well constituted, ethical principles should form the base and groundwork of its Constitution.

Every condition of life has its peculiar rights and duties arising from the special situation in which human beings may be placed, and flowing from the various relations created by such situation. These subsidiary rights and duties are of course referable to general ethical principles, but for convenience of study they may be considered apart. Thus in a State the relative position of the governors and the people creates a special condition with its incident rights and obligations. There is something of mutuality in these duties, but mutuality is not their foundation. The fact that two sets of duties are relative, that neither exists alone, does not imply that either one is the foundation or underlying principle of the other, but may imply that they have a common origin. There is an apparent interdependence of duties, not an actual one. We cannot make duty dependent on the performance of a duty by another, nor may a failure on the one side justify failure on the other. Such a rule, applying to the whole, would also apply in part. Obligations cannot rest on so unstable a foundation. A varying standard is no standard. Custom fixes points of view. No one

will admit that the duty of those intrusted with the administration of public affairs is dependent totally or in a degree on the obedience or the loyalty of the people. That the duties of the people are not to be measured by the actions of their rulers is not quite so clear to the ordinary mind. History shows many instances in which neglect of duty has thus sought to justify itself. What may justify rebellion will be hereafter considered.

Assuming that these two classes of duties have a common origin, where must it be sought? Clearly, I think, at the same source from which other ethical principles are derived,—in the nature of man. Societies political are in no sense voluntary associations of persons for a specific purpose. The natural purpose exists, and is a guide for the formation or the correction of systems, but the voluntary feature, if it ever existed, has long been lost from sight. Even if at any one time a purely voluntary State association should create itself, it would simply be doing as a voluntary act what necessity demands. It would only be obeying a law of man's nature. Under whatever system or in whatever form such a society might be constituted, it must more or less perfectly fulfil the purposes for which all societies of that kind exist.

Societies have the sanction of personal needs. As they can exist only under certain systems of government, creating the two classes of the ruler and the ruled, the administrators of government and the beneficiaries thereof, the duties and obligations respectively of these two classes arise from the inherent nature of societies themselves. This is an abstract statement. The concrete application to any particular society is not so simple. Yet the general rule holds good; the exceptions are justified by the particular facts of each case. This abstract idea of State existence and the consequent duties of the governors and the governed as arising from the inherent nature of man, seems to be expressed in the often

quoted and often perverted phrase of St. Paul that, "the powers that be are ordained of God." This famous text has been a weapon in the hands of the upholders of tyranny and of arbitrary power. Thus misconstrued, it has imposed upon thousands of well-meaning, but little-thinking persons. Its proper interpretation gives to those powers just so much of divine sanction as is derived from the fact that as communities exist, rulers there must be, subject to divine approval if just, to divine condemnation if the office is abused.

From the necessity of the case, many different States and peoples must exist on the earth. All persons, then, occupy two positions in relation to government. They are citizens as to one State, aliens as to all others. Autonomy requires that as between a government and its citizens there should be rights and duties, privileges and authority, which do not appertain to citizens of other States. Yet as to the main ethical rights there should be no discrimination in their application, whether to citizens or aliens. Nations should not, in their relations to each other, be in a customary position of antagonism. Since the time when all foreigners were regarded as quasi-enemies, a marked change has occurred. The facilities of modern travel have made the world more nearly akin. The protection which powerful nations have demanded for their citizens in foreign lands has introduced a new principle into international law. Thus in advanced States the domiciled foreigner or the temporary sojourner enjoys all essential rights equally with the citizen. The doctrine of perpetual allegiance is obsolete. The chains which bound persons forever to their native land are removed. The chances of improved condition in other lands are not denied. The right of expatriation and change of citizenship is usually regulated by conventions between nations. These details furnish an interesting chapter in international law. They all mark a

great advance in civilisation, a breaking down of prejudice, a more enlarged conception of human rights. The general rights appertaining to humanity are here considered, not the special rights and privileges which arise within a State. To the privilege of travel, of sojourn, of domicile, or of adoption of citizenship, there may be a limitation. Every State owes to itself the duty of self-protection. If satisfied that the presence of foreigners is a danger to its political system, or an undue strain on its resources, then exclusion is just. In the family of nations each one is supreme within its own jurisdiction. Provided that while within its territory the general rights of aliens are respected, subsequent exclusion is to be treated as a matter of policy, not as a derogation of a right. A forcible attack upon this policy of exclusion has been made in different instances on the part of highly civilised States, directed against States of a lower degree. When such a departure from the principle of autonomy may be justified is to be determined by the reasons given for such action. They should be very weighty reasons to draw forth the approval of Christendom.

The earth being substantially parcelled out among nations, every individual must be a citizen of some one nation. In his relations to everyone outside of the State, the citizen looks to his own government as his representative. International law recognises the responsibility of States for their citizens. It would seem to be an inherent right vested at the moment of birth, by which one becomes entitled to the protection of the State, to be subsequently followed by the obligation which that right imposes. This principle is recognised by all nations. This rule of birthright is subject to an exception, when the parents are only temporarily sojourners or are representatives of their own nation. This is no denial of the rule stated. The birthright exists,—it is only transferred to another State, it being contrary

to the notion of human liberty that persons shall always be restricted to one country. A second method of acquiring citizenship is by adoption. This needs for its completion two acts — renunciation of allegiance as to one State, naturalisation as to another. These acts, implying by their names a certain sequence, are, in fact, simultaneous, and necessarily so, otherwise the status of the individual is in suspense.

The act of renunciation is, therefore, usually evidenced by the act of naturalisation. For the reasons before stated the methods of naturalisation must be prescribed by the State. Until in the process of evolution peoples shall have arrived at a nearly equal degree of civilisation, and until, by the same process, all existing governments shall have attained a certain degree of perfection, unrestricted adoption of aliens will be an unsafe policy. The State then dictates the terms of naturalisation,—it may enforce exclusion. Before absolutely renouncing allegiance, a citizen should have fulfilled all the obligations owing to his State. These should not be evaded by expatriation, and the State may properly insist on their fulfilment. Questions of this nature have excited controversies between nations. They are full of details and must be settled by treaties. They are within the domain of international law, but are here alluded to only in their ethical aspect.

Although a member of a community has, under certain conditions, the right of expatriation, no correlative right of ejectment remains to the State. The duty of a State, in the care of its citizens, is inalienable. That this must be the case appears from the fact of the supremacy of a government within its own territory, and from the right which inheres to everyone to be a member of some community. The position of persons evicted from one State and denied admittance to another would be pitiable. Instances of this kind are to be found. The enforced

exilement from one country and incorporation within another has been quite common. It is found in cession of territory and with it the transfer of the inhabitants, either to the victors in war or by way of purchase and sale. If the consent of the inhabitants of the transferred territory is not obtained—and it rarely is obtained,—it is difficult to perceive on what ethical grounds such transfers may be justified. As a matter of policy also it seems unwise and dangerous. All governments rely in some measure on the good-will and support of their people. The more nearly a government approaches the representative form, the more essential does such support become. It will not be found among a people thus forcibly transferred. The relation of States to one another is such that, although a State might find it to its interest to get rid of some undesirable inhabitants, it cannot impose them on any other community, nor is it to be expected that any other will consent to receive them. It must deal with its own people as it finds them. The conclusion, then, is inevitable that the separation between a State and any of its members can be effected only by the voluntary act of the latter.

Apart from the determined ethical rights above discussed, there are certain others which may be termed secondary rights, whose preservation is essential to the complete enjoyment of the former. These also have their limitations. In the main, throughout the civilised world the ordinary well-settled rights, and such as are easily apparent, are fairly well protected. Those, however, belonging to the second class, not so pronounced, nor so generally understood, are now often infringed. They are derived, like the first, from the human constitution, and are necessary to the full and proper use of the human faculties. In instance may be cited the right to the prosecution of the various industries untrammelled, except by just limitation,—and of just limitation

it is difficult to conceive of any other than the requirement that no industry shall be detrimental to the moral and physical welfare of the community.

The right of association as an economical method of conducting industrial pursuits seems to demand as large a liberty as is consistent with the rights of others in the prosecution of similar industries. Upon all economic questions there is a strong liability of legislative erring. Political economy is as yet an uncertain science, an unperfected study. The State is not in a position to direct industrial movements. When action is necessary and is within its proper sphere, it should be as closely as possible restricted to the line of its legitimate duty, a care for the equal rights of the people. The right of indemnity for any injury inflicted by the State is as clear as a similar right against an individual. The right of petition for the correction of injuries or for legislation favourable to human rights is strictly in accordance with the principle that regards the State as the protector of its people.

The statement that impartial legislation should be the underlying principle of State action, that the rights of all should be treated with equal respect, as an abstract proposition, would receive universal assent. It was asserted as a self-evident proposition in the Declaration of Independence more than a century ago. It was again asserted with a loud voice in France a few years later. In that time, however, the principle was rarely if ever incorporated in political Constitutions. Classes and privileges were the rule, and probably are to this day. But it is more in practice than in theory that equality of rights is violated. While the principle is distinctly announced in State Constitutions as the rule of public action, it is in administration constantly disregarded. Moral and intellectual weakness both make this possible. Wealth with its vast influence and its misuse aids corruption, enables its possessor to escape penalties and to enjoy privileges.

A lack of sound knowledge of political philosophy gives rise to wrong methods and unwise policies, effecting in themselves a perversion of the principle of equal rights. It would not be difficult to instance from political history many types of methods and policies deserving this censure. The purpose of this work is not to criticise nor to suggest methods in detail, but only to point out, if possible, the general principles by which they may be tested. In one respect the natural and inherent fallibility of human nature renders this equal and impartial treatment an impossibility. In the punitive system, all must be held to an equal responsibility. Yet the varying conditions in which individuals are placed must modify their responsibility. These conditions as a measure of obligation can be known only to an omniscient power. They are beyond human knowledge. Hence any defence to a special application of an unvarying measure of responsibility founded on difference of character, of degree of intelligence, of moral capacity, or of education, would fail from the lack of the power of verification. Apparently, this view negatives the prior one,—possibly it may to an intelligence superior to human intelligence. To the latter, rights and responsibilities admit of no individual exceptions.

The demand for equality of rights is based on the same principle as that on which all ethical rights and duties are founded, namely, the constitution of man and its needs. It is impossible for human intelligence, acting as it must within its own limits, not to believe that the human constitution in every instance claims the use of all its faculties. This fact, the State as a conservator of ethical rights cannot disregard. To the right of impartial legislation, communal existence, as in other cases, gives a limitation. Special exceptions as to mental capacity, moral delinquency, the needs of the public service, and others, make occasional departure from this rule a necessity. If

there is any truth in the saying that exception proves the rule, such as these go to confirm the adage. In all those works which the State may or may not undertake to perform, which may be left to private direction or be a public act, as expediency suggests, ethics is simply a guide or corrective. Expediency should not prevail against established rights.

If the foregoing words have any weight, they will serve to show a close connection between Ethics and Political Science in all its branches. The State may be said to be an agent, both to enforce ethical rights, and to protect them. To the State is the final appeal on the most important questions which may arise as to the justice of State action. If there is anything of value in the ancient fiction of the divine right of the ruler, it lies in the high dignity of the office as guardian and protector of ethical principles.

## CHAPTER IV

### SPHERE OF STATE ACTION

THE State has been represented as performing the office, surrendered by the individual, of sustaining rights and of performing certain works deputed to it—all being held strictly within the rule of ethical principles. But not all rights nor all works are thus surrendered to the care of the State. There is a limit beyond which the State should not proceed. It is possible to enumerate certain offices clearly within the province of the ruler. It is possible also to mention others clearly outside of that province. But between these two extremes there is a large area of debatable ground,—debatable in a strict sense of the word, as it has never been possible, and probably never will be possible, to define abstractly to which province it properly belongs. On this ground the old battle between individual liberty and governmental power has been waged; on this ground the contest of political theories still rages. This contest may sharpen the wits and exercise the intellects of the contestants to the end of time, if the question is regarded as an abstract one. Communism and the paternal theory present the claims of the State; Democracy the claims of the people. Provided there is no opportunity to put into practice the opposing theories, some light may be evolved from their attrition. In the meantime an impartial observer may perceive that the line of equilibrium between the opposing forces is a varying one. He may note the distinctive positions of the opposing claimants, and as to all others

recognise the fact that the problem is to be determined by the peculiar conditions under which it presents itself. One may also indicate the direction in which an advanced political philosophy points, a direction to be followed when it may be done with safety.

We have the testimony of history, that either extreme is fatal to good government. The extreme of excessive and arrogant power excites a feeling of hostility towards the State. In time, its power overreaches itself and its overthrow is accomplished. The other extreme of too little force presents a condition of affairs equally deplorable. The authority of the government may be so slight that its existence is imperilled; it is inefficient, unable to perform its proper and necessary functions; the rights of the citizens are not firmly and equally maintained; weakness invites foreign encroachment; a tendency towards disintegration exists, and a species of anarchy follows. Between these extremes a State may exist. Its faults will not be vital. A system without flaws is impossible. Time, experience, a proper conception of the true nature of human rights, and the true functions of government in their preservation, may form a system adapted to the character and conditions of the people to whom it is applied. The secret of the failure of theoretical Constitutions probably is to be found in the fact that they attempt too much,—they lack the power of adaptation,—the means provided for the accomplishment of their purpose are not effective. It is far easier to alter and improve an existing system than to create one anew. In an existing system, while time shows its errors, it also shows the method of correction.

Everyone will admit that it is the duty of the State to protect life and property. Everyone will deny that it is within the province of the State to prescribe modes of dress or the degree of private expenditure. The errors of extremes are readily susceptible of criticism, but the

middle course, proverbially the safest, is yet the most difficult to follow.

The extremes of too much rule and of too little rule have each their peculiarities and their influence, both upon the governor and the governed. To the first, the term paternal government is applied; to the second, the word democratic. No one can deny that there is a great deal in a name. To both of these, sentiment has attached an idea which obscures their true character. And truth is often belied by sentiment: sentiment allied with truth has added strength; opposed to truth, it has a mischievous influence very difficult to counteract.

Paternalism in its present meaning has forgotten its origin. The idea of stringent rule and inevitable authority is more conspicuous than that of beneficent care. It implies continued direction on the one side, continued submission on the other. The extreme of despotism is but one form of paternalism. The qualities of these opposing ideas in government are perceived in the effect which each produces upon the rulers and upon the ruled.

Paternalism magnifies the office of the ruler,—tends to a perpetuity of the system, and opposes reform. Upon the people the effect is to lessen personal independence and self-reliance, to withdraw motives for improvement, to prevent a development of better characteristics. People learn to look to the State for everything, even for reform in the government itself. When those who have been brought up in this school demand reform of existing errors, they do not look to increase personal liberty as the means; they expect such reform to come through State action, even if the State authority is thereby increased. Socialism and Communism, mostly recruited from those in whom the habit of dependence is fixed, seek the remedies in a still greater degree of State authority. The paternal form of government is not to be condemned in the abstract: it may be suited to some

peoples. As is expressed by a distinguished writer, "from despotism to democracy there is scarcely a form of government which might not, at least in some hypothetical case, be the best possible." But the paternal system does not educate the people in those qualities which enable them to perform their part in a more liberal and advanced civilisation.

To turn to the opposite extreme, where the power of the State is the least and the freedom of the people the greatest. The term "democracy" expresses this condition, though it has as many degrees as any other form. Here again may be noted the insufficiency of names. Democracy, meaning the rule of the people, is misleading. Universal suffrage does not necessarily make ultrademocracy. An elective monarch may be absolute. An hereditary monarch may be much restricted in authority. The more or less popular feature of election determines the character of a government less than the degree of power intrusted to the government, and the system of administration.

There is no doubt that freedom of individual action, a lack of dependence on a higher authority, fosters a spirit of self-confidence, a reliance on one's own powers, and thus far is favourable to such condition of a people as makes an enlightened form of government a simple possibility. On the other hand, it also fosters an impatience of restraint, a tendency to oppose the exercise of authority, to assert self-interest against the interests of others. This condition also as to the administrators of government detracts from the sense of responsibility and the beneficent dignity which accompanies responsibility.

Comparing these two extreme systems, much more in the direction of political advancement is to be hoped from the one than from the other. It is more difficult to detract from power than to add to it, because those having it are loath to resign it, and those who have long

been subject to it have not learned to do without it. But a people unhampered by the precedent of extreme authority will welcome such addition to that which exists, as its need becomes apparent.

Here is a clue to the course to be pursued in our search for the principle on which the extent of State authority is based. We must commence at the lowest degree of State power which previous study has shown to be necessary, and ascend as the additional requirements of communities become apparent.

The extreme difficulty of fixing a standard of State action lies in the undoubted fact that a different rule must be applied to each State, according to the varying conditions of density of population, the character of the people, the system under which they have hitherto lived, and the fact that a change in condition makes necessary a change in methods. Nevertheless, if the main principles on which all rule should be founded can be set forth, they may furnish a test or at least a guide to determine this important question.

In a prior chapter it has been asserted that the very existence of government must be justified by its necessity as a means of fulfilling an office which it alone can accomplish. Apply this same idea to every act of governmental authority, letting each act be judged by its need to accomplish the just purpose for which alone authority exists; assume the postulate that the right of human freedom is supreme, that every restriction on such freedom is permitted only for the better security of human rights in the main; apply to each act the question whether it is in pursuance of the legitimate duty of the ruling power,—and a rule is obtained, built on the cardinal idea of human liberty and right. It is not an inelastic rule. The results of its application may vary in different cases and at the same time be consistent with itself. Its application will rob revolt of its excuse.

The tendency of governments and of peoples varies. In The United States, the direction is towards diminution of governmental authority. Even business of a public character is often left to private enterprise, upon the theory that it will be better conducted than under governmental control. So largely does this idea hold that the fact is often overlooked that works of a public or a quasi-public character are not strictly private enterprises, to be conducted solely in the interests of the owners. Works of this kind are, in fact, doing a public work and should be governed by the strict requirements of such work, more especially wherever privileges and monopolies are granted and where private property is taken for this special purpose by the supreme authority. It must not be forgotten that the exercise of this power is justified only by public need, though the work may be deputed to private hands. This fact has been disregarded by the State itself in many instances, as evidenced by the passage of general laws of incorporation. Such laws may be proper when applied to business corporations doing only the work which individuals might themselves do; but improper in the case of public work. This should come under special authorisation, in view of a special need.

The opposite tendency is observed in most countries of Continental Europe—the tendency to extend the operations of government. It is easily possible that in many instances both the character and training of the people, and the system and practice of government have made a large extension of functions a necessity. But in other cases neither the needs of the people nor the peculiar character of the governmental system make such extension practicable or desirable. Of the requirements of special cases, it is not easy to judge; but of tendencies one may express the general opinion that the direction towards the reduction of functions is, *cæteris paribus*, likely

to conform best to the theories of good government. A multiplication of functions exerts a strain upon the system, and is liable to effect a diversion from its true purpose. It would be very convenient, in order to fix the limitations of State authority and duty, to establish a working rule under which each case might be brought as it arises. For the reasons heretofore stated, such a simple method of determining questions cannot be had. We must refer them to the general principles which have been set forth. But the method of application may be exhibited somewhat in detail.

These general principles are, as before stated: 1st, That it is the duty of the State to protect the rights which are well established according to the ethical principles as above enunciated, wherein man, according to the existing social conditions, is unable to protect himself in their enjoyment. 2d. That when such rights are not directly involved, acts of policy should carefully avoid infringement of any right, and in themselves should be directed towards the better security of rights.

The application of these laws will more distinctly appear, as the various functions of the State are considered in order to ascertain their need and extent. In addition to the principles above named, the historic test should be applied wherever it is possible to collate facts, to establish relations between cause and effect, and to verify or disprove theories.

The right to life, and the duty of the State to protect it, will be admitted without question. Yet this duty is incompletely performed without protection, not only against direct assault, but also against what seems to endanger life, and not only to endanger it, but to render its existence less perfect. Enforced hygienic precautions are within this meaning. This affords a striking illustration of the additional measure of State action made necessary by the density of population, the jostling of

propinquity, and the corresponding need of personal restriction due to the same cause.

The freedom to occupy any portion of the earth's surface which one may desire, at first sight appears incontrovertible. This idea has served as the text of many wild notions leading to dangerous errors—the more dangerous as their plausibility is marked, their theories being very attractive to some minds. The earth is said to be a gift to the whole of mankind and inseparable—any restriction of its use a denial of a divine right. The very notion of a several property has excited the ire of some political sects. So far from its being a truth that nature has granted the privilege of general occupation, the fact is that nature itself has set bounds to unrestricted occupation. Difference of climate and difference of race effect a limitation. From a large portion of the earth some peoples are by their constitution absolutely excluded.

Race peculiarity has made a very comprehensive society an impossibility. Societies are naturally divided according to the special traits of peoples. With increase of population distinctive features become more marked and form a bond of union, creating societies within societies. Nations thus necessarily constituted must be geographically limited. From the nature of the case, then, apart from voluntary act, the earth has come to be parcelled out among various communities separated from other communities by a natural coherence of its members. Each nation must have its special polity, and all property within the limits of the State must be held subject to the rules adopted by that particular community. The history of the human race shows that the conditions thus expressed are imperative, and negatives the general premise of the right of universal occupation. If a communistic right is to be sought, it must be looked for within some of the divisions which the genius of humanity has made necessary.

It is by no means to be implied that territorial limits are exclusive. Though, as before mentioned, the right of exclusion must exist, yet whatever rights to the use of territory there may be, they must be held in the manner dictated by the State. We are here confronted by the law of density, so to speak, with the fact testified to by all experience, that there is an abridgment of freedom proportionate to the density of population. In sparsely settled countries freedom of locomotion is but little restricted, and little of special property is to be found, yet it is to be remarked that what special property there is, is more jealously guarded than in differently constituted communities, and for the obvious reason that its possession is usually of the most vital importance to the possessor. There is no doubt that the sacredness of property has its most striking exposition where the laws are the fewest and property the least varied. In such places also human freedom is the largest, the State care of the person the least.

It is instructive to study communities in their different stages. In the earliest and rudest are found the germs of laws and institutions to be largely developed in advanced stages. The difference between the extremes is in degree more than in kind. The right of property, as before mentioned, is maintained with perhaps greater tenacity in ruder communities than in more advanced ones, though applied to fewer objects. The right of life cannot be so carefully guarded by the State, but its infringement is often punished with greater severity. In theory, the more important rights of humanity are acknowledged, though the methods of guarding them are imperfect, much being left to individual care, but little to the care of the State.

The complexity of affairs in a highly civilised and closely settled society tends to obscure certain principles in themselves simple and easily derived. In all social

and economic questions this difficulty is conspicuous. It is by no means easy to disentangle the main question from collateral circumstances which confuse it. Accordingly, diametrically opposed views are maintained with the utmost obstinacy, when each side is partly right and partly wrong. The subject of the right of private property has developed two sets of opposing views, the one holding to its inviolability, even to the extent of sustaining its abuse, the other denying that there is any such right.

The attempt will here be made to correct some of the errors which each of these sets of views incloses. It has not needed a far degree of civilisation to originate the idea of private property. The presence of more than one person within a definite territory is sufficient to make the claim at least to appear. The savage would resist to the utmost of his ability an attempt to dispossess him of the clothes he has fashioned from the product of the chase, or the hut which his own hands have constructed as a protection against the weather. He would share them with another only if compelled by force, or as an act of benevolence. He believes their possession to be necessary to his existence and comfort. He reasons that they belong to himself as the result of his labour and skill,—and his reasoning is sound. The earliest associations of human beings very likely had for their purpose the protection of these very rights against foreign encroachment. We may, like the savage, base this right on necessity and natural claims to the results of our own exertions. Let us apply also the historical test, to decide whether or not this right has aided the improvement of mankind, has furthered the march of civilisation.

As society advances, as the comforts and the conveniences of life become more abundant, so do the objects of property increase. The luxuries of one age are the necessities of another. As all this has been brought about

by the exertions of individuals, and as such exertions would be of no avail unless their products were made secure, the right to the possession of one's acquisitions may be regarded as furnishing a motive to exertion. Contrasting the present condition and the past progress of two countries, the advantage will be found on the side of that one in which the results of labour are best assured. Thus the historical experience of the utility of the right of property as a means of progress, and the argument of its necessity and of the natural reward of labour, unite in sustaining the right. The State, therefore, usually recognises its existence, assures its possession, regulates the method of enjoyment, and in some cases the mode of acquirement. Familiarity and long usage have a tendency to merge the concrete into the abstract. We cease to investigate the title to that to which we are long accustomed; we rely on prescription. In this way that which in its origin had a good reason to be, may in time have become so changed as to have lost the character on which its original title rested, may be sustained only by the abstract idea. A constant examination is necessary to know if the original claim still exists.

It is held by some that, granting the claim of the original acquirer, one who takes by inheritance or by bequest stands in a very different position, that none of the justificatory reasons above alleged can here apply. This is true. To sustain the right of possession in the recipient, the right of the donor to give must be made apparent. It has been assumed that security of possession is a strong motive to exertion. It is a wise policy in every State to encourage industry, and to a certain extent, frugality. Surplus products beyond the needs for daily consumption form a reserve fund for a time of need, the proverbial rainy day. A still more effective use of this fund is as a means by which personal improvement is effected and the effective force of future labour

greatly enhanced. It is not strictly within the province of this department to deal with economic questions, still it may be permitted to suggest in a few words in what way such surplus funds arise. Suppose, at any one time, the daily labour of a people to be sufficient only for the sustenance of themselves and of those dependent on them. Evidently, as long as this condition remains, so long will the position of a people be stationary. Suppose a second condition, when the profits of daily toil are more than is required for daily sustenance. Then there comes an accumulation of products, creating a fund which may be used in more ways than one. It may afford the opportunity of enjoying the luxury of idleness until the fund is exhausted; in which case the stationary condition continues. It may, by liberating labour from the daily needs, employ it in bettering the condition of the people and in devising appliances by the aid of which human labour may become more efficient, its product be increased and better preserved. Here the stationary condition ceases, improvement begins. Progress leads to further progress. A judicious use of accumulated industry alone makes possible a state of high civilisation. It may surprise some to whom the word "capital" is obnoxious, to know that it describes the reserve fund from which such beneficent results have arrived. Great results are effected by the assistance rendered to present labour by past labour. If, then, industry and frugality have accomplished so much, it behooves the State to foster industry and frugality in its people. One method of doing this has been pointed out: the securing the products of labour. Another may be the enabling one to bequeath them to those allied to him by ties of blood or even of friendship.

Property being assured to its possessor during life, a necessary question arises: What disposition should be made of it after the death of the possessor? Either it may appear that some person or the community in

general has a just claim upon the property, or, failing that, it becomes a question of policy. But that any matter may be treated as one of policy, it must be shown to be quite outside the question of right. In many cases property, being the result of labour and frugality, would not without them have existed at all. Here no valid claim in opposition being allowed during the life of the possessor, there is no foundation for any subsequent claim, excepting such as may arise out of existing personal relations. In all civilised communities where the family relation is maintained, the obligation which everyone owes to support his family is recognised. Claim on property, then, is a continuation of the claim on the person, and may properly continue in favour of those who, by reason of age or sex or some peculiar mental or physical condition, are incapable of self-support. But it is not possible for the State to make very nice distinctions, to determine exactly how long the circumstances on which a possession is based continues. Consequently, it has been usual to vest an estate in the immediate descendants of an intestate without considering whether or not the self-supporting condition was present. The claim of right is continued beyond its need as a matter of necessity or of policy.

If the obligation of support on the part of one having others dependent on him, usually recognised and enforced, is properly continued after the death of the possessor, it is difficult to understand why the power of bequest should be allowed in opposition to the recognised claims. Beyond such claims any other permitted disposition is to be justified only as a matter of policy, and that only when not in derogation of a right. A directly operative motive to industry is the notion that one's property is subject to disposition by will. This is a sentiment, perhaps, but sentiment has a powerful influence on the human mind.

As a matter of policy, the idea may prevail that the fund obtained by taxation for the expenses of State administration should be regular, or at least should be directly adjusted to its purpose; that sums reaching the treasury in irregular or uncertain ways form a fund not readily traced, and that its application cannot be easily guarded. In pursuance of this policy a system of bequests, not doing violence to any established right, may be justified. Upon the same ground descent of property to others than those of one's immediate family is permitted.

It is always the safest plan in judging of the expediency of any measure to consider its possible defects as well as its possible benefits. There appear to be two possibilities of evil in permissive bequests and in inheritances beyond the limits above indicated. One is an undue accumulation of wealth in the hands of a few; the second, the liability of its misuse by those who have not acquired it by their own exertions. Speculations on topics of this nature are verified or contradicted by experience. In this country neither law nor sentiment has favoured the notion of primogeniture. In early history are found instances where pride of family name or of family estate has induced a voluntary continuance of this rule for perhaps several generations. But as a custom it cannot long continue in opposition to the general sentiment of a more equal distribution. By divisions and subdivisions, the tendency is toward a disintegration of estates. The history of bequests in this country, in spite of a few striking exceptions of some instances where lack of wisdom more than of good intention is evidenced, has in the main been free from injurious tendencies. The just claim of dependents are usually well considered, and the country is dotted with educational and charitable institutions created by the benevolent bequest of their founders. In other countries a disposition to form large accumulations

of property, even when not directly favoured by the law, is evident. This inclination is especially marked in England, where it is the result of historic causes. [A bill introduced in the House of Lords on March 7, 1893, providing for the distribution of real property in the same manner as personal property, was strongly opposed, as striking at large estates and effecting a fundamental revolution in the system of inheritance.] Whenever such tendency exists it seems quite within the competency of the State to make such restrictions as a wise policy may dictate. Apart from the recognised claims of immediate dependents, the question is one not of established right but of the best interests of the whole community.

The second possibility of evil to be considered is a probable increase of large wealth not acquired by the industry of its possessor. There is a presumption that large wealth in the hands of one or a few is detrimental to the community, arising from the fact that capital, which should be used in productive employment, may be used in idle luxury, and from the consequent corruption which such use entails; also that it grants to its possessor a vast power and influence liable to abuse. Here is an argument from the power to the abuse,—an assumption that the evil propensities of mankind will assert themselves whenever the opportunity is given. This supposition is far too general. Resorting again to experience, does not that show, as might readily be expected, that the manner in which wealth has been acquired furnishes a tolerably accurate prediction as to the manner in which it will be used? Everyone respects the virtues of frugality and industry. Everyone believes that the wealth obtained by the practice of those qualities is fairly earned, and that it will be fairly used. The training obtained during its acquisition will probably qualify one for its judicious use. No such guaranty is found where wealth has been obtained by inheritance or bequest,

though the liability to waste and extravagance is greater than to improper and vicious use, detrimental to the community. As before stated, fortunes thus obtained are not, according to the customs of this country, likely to be very numerous or of very large amount. The reason given in favour of permitting bequests may override the remote probabilities of their misuse.

There is another class of owners of property distinguished from all others by the method in which the property has been acquired—the method of speculation or of corrupt practices. There are good grounds for believing that the popular feeling excited against the possessors of wealth at certain periods is in reality directed against those who have obtained it in this way, and that it comes from a conviction that the wealth thus acquired is not deserved. The public mind, unable to make the distinction between the well-gotten and the ill-gotten, includes them both in its anathema. In truth, the ill-gotten wealth is usually perpetuated by the same means by which it was acquired, and thus continues to justify public reprobation.

Such a condition of affairs presents a difficult problem, with which the State is required to contend. There is the liability to the same error as the popular one in the difficulty of distinguishing the origin of the whole or of a part. There is the danger of making the just suffer with the unjust, so that a radical remedy is impracticable. Still, measures of a preventive or of a corrective nature may be applied. It is by no means unlikely that for the opportunities of getting wealth by improper means and of ill-using it when obtained, the State itself has been in fault. The possibilities of obtaining wealth by unfair means may be owing to faulty economic or financial measures, or to undue partiality towards some special industries. The possibilities for the corrupt use of wealth may be due to a faulty political administration, to an

incorrect penal system, or to negligence in its enforcement. It is not to be wondered at that the spectacle of wealth, known to have been unjustly obtained, or to be unworthily used, should excite popular discontent, and a conviction that a system which fosters or at least permits such errors is itself in fault. It is the duty of administrators of public affairs always to heed the signs of the times, to regard exhibitions of discontent as a public symptom of some disorder in the body politic, and to seek its causes.

At the present time the greatest abuses of the rights of property are exhibited by corporations. Whether lacking the proverbial soul or whether division of responsibility diminishes its weight, the fact seems unquestioned that persons acting in a corporate capacity are guilty of faults from which individually they would shrink. The power for evil is as much the greater as the aggregation of wealth exceeds individual wealth. Whatever abuses may exist in the system of corporate privileges are clearly within the power of the State to avoid, if not to correct. It is only by the grace of the State that corporations exist, and not in virtue of any inherent right. The authority which grants them extraordinary powers for specific purposes, may, when creating them, apply restraints and attach conditions as security for their proper use of the powers granted.

So far, property rights have been considered without regard to kinds, tacitly assuming that the different kinds rest on the same general grounds of right, differing only in degree and in modes of enjoyment. Considering at present only material things, it has been strictly maintained by some political philosophers, and by some who are not philosophers at all, but whose zeal and earnestness entitle their views to respect, that land differs from all other material things in those qualities which unfit it to become the subject of private occupation, and that such

occupation is in contravention of well-established rights appertaining to human beings in general. It is proper, then, not for the sake of discussion, but to seek the true light in which the subject should be placed, to determine if the rules by which the right of property is fixed can properly apply to land as to other material things. Its apparent difference from all other things is marked. It is not susceptible of direct appropriation as are moveable things. It exists always, and is not the creation of human industry. If the right of property were based on labour alone, almost everything which we have been accustomed to think of as property would be excluded from the category of proprietary things. Labour creates nothing. Applied to existing material, it fashions such material for use. The product of labour then is a union of material and labour in varying proportions. In some cases the value lies mainly in the labour and skill employed in the construction; in others, labour has done little more than to render something available: in all there must have been a property in the material before labour can be employed in its improvement. But as everything on which labour may be expended is attached to or grows out of the soil, or is dependent upon it for existence, the acquiring possession of the material of labour may require the possession of the land on which it subsists, or of which it forms a part, for various periods of time. The necessary duration of these periods may be limited to a few moments or hours, or may extend to years or to a long succession of years.

It should be noted also that exactly as societies advance from a loosely populated and ruder condition to a more densely populated and more complicated condition, so do the various industries in which society is occupied become more elaborate, and the structures needed for their prosecution are made possible only by a long possession of the land on which they may be erected. Similarly,

improved systems of agriculture are made possible only by assurance of long possession of the land to which they may be applied. Thus, between labour, the material on which it operates, and the land from which the material is produced, there is a close and necessary association. Tenures of land so obtained continue only as long as the need of continuance remains. Further extension must find its justification on other grounds. But neither a limited nor perpetual right to property of any kind may be permitted, if in violation of well-settled rights appertaining to humanity at large. It has been asserted by some that every private ownership of land is such a violation. Politics has probably more than other branches of learning been dominated and misled by theories. The mischief caused by theories, unsound in themselves, or, if correct, improperly understood and carried to fatal conclusions, needs to be dealt with very leniently. It is usually the work of high-minded, zealous men, directed by the best motives, but often failing to correctly appreciate the theories which they espouse. The cause of humanity may often implore to be defended from its friends.

It is an attractive notion, that all mankind, all animal life, in fact, has a claim upon the earth for subsistence. Each new arrival presents a claim for such a share of land as may be necessary for habitation or support. There is such intimate association between life and the earth which supports it that the two are not severable by human act. The earth is for the use of man and of all men; consequently, a several appropriation of a portion is a restriction, as to that, of the rights of all others. This permission may absolutely exclude many from a participation in that on which nature has granted them an interest. The picture of the landless man with no abiding place of his own, except as its use may be granted by benevolence or purchased by labour, is not

attractive. The picture of every man under his vine and under his fig-tree is a pleasing spectacle. Nevertheless, it may be that the former condition may, more nearly than the latter, accord with the beneficent use of the earth's surface. The truth that the earth is designed for the use of man must be accepted with an explanation of its meaning, the explanation being that it is designed for the support and enjoyment of man in the manner in which that support and enjoyment can be most thoroughly and satisfactorily afforded. This view negatives the conclusion of an unparcelled use of land. In truth, such use is compatible only with the nomadic state. In all other social conditions a more economical use of land is imperative. In even moderately compact communities a large portion of the people not only has no landed possession, but does not require any, and would be embarrassed by its possession. In the divisions of labour some industries require the possession of land in greater or less quantities; others require very little or none; and the product of the latter class of labour grants the enjoyment of the products of the former. It appears, then, that no inherent natural right forbids the several possession of land, that, on the contrary, its use for the general benefit of mankind is better thus assured than by other methods.

The right to possession of land during the periods needed for the proper application of labour being conceded, the question still remains whether it may justly be continued beyond such requirements. Here we must avail ourselves of the experience of the past, to learn if such extension has produced good results. It is not the part of wisdom to find in its antiquity the sole recommendation of a long-existing institution. It is equally unwise to deny that long existence under varying conditions creates a presumption of fitness to a purpose. In the history of politics and of institutions abundant

instances are found of the various systems of tenure of property. The unparcelled, unrestricted use, the temporary use limited by the direct needs of occupation, the permanent and well-secured interests—all have been exhibited in their different stages of progress. We need not expect much enlightenment from a study of very early systems. They show the effects of certain methods, but under conditions different from those we are obliged to consider. In modern highly developed States, an agreement is observed in the holding of private property in land. This policy has been reached in course of development. In almost every case the reservation of common lands has been abandoned from the conviction that such use is not the best for the common interests of the community. Agreement on this question of private property is found in modern States having different systems of jurisprudence under which property rights are governed or restrained. The various statutes for quieting possession give evidence of a policy of security as opposed to frequent changes and disputes.

Another objection to property in land here suggests itself,—the liability to abuse. In order that this objection may be held valid, one or both of two postulates need to be assumed: that use of land is necessarily or frequently to the public detriment; that it is not within the legitimate power of the State to restrict this use within proper and wholesome limits. The first of these assumptions is negatived by experience; the second, by the theory of State limitation of property rights. The facts seem to be that in communities where freedom of action is not unduly restricted, an enlightened self-interest usually dictates such employment of property as is for the benefit both of the owner and of the community, that instances to the contrary are exceptional, and that such instances are within the restrictive power of the State. It has been asserted in preceding pages as a cardinal principle

that all rights are subject to such limitations as do not destroy them, but rather strengthen them in their very essence. Property is subject to this treatment.

In every enlightened State we observe restrictions on the use of property to the effect that it shall not interfere with the just rights of others, which just rights are equally modified. This restrictive power is not always well used. Sometimes the individual suffers, sometimes the people. But we cannot accept as a valid argument against a right or a power otherwise well established, that it may be liable to abuse, unless the possibilities of abuse may neutralise the good effects of the use. Corrective power against personal abuse should reside in the State; against administrative abuse, in Constitutional restrictions.

The argument against property in land has availed itself of one possibility of misuse in the direct disposition of the land itself. In some populous countries large tracts have been retained as unproductive wastes for the gratification of the sporting propensities of some wealthy owners. This may in some cases be a gross abuse of property rights. No one can absolutely separate his interest or his duty from the community of which he forms a part. The aggregate virtue, industry, frugality, and wealth of a country form its character. To attain a high character, solidarity of a people is necessary. Its members are so closely associated that personal use of property has a general effect, and, conversely, general methods effect individual property. Mutual obligation imposes on each one the duty of making such use of his rights that both his own and the general interests may be advanced. The appropriation of a large tract to personal gratification, its withdrawal from productive use may, in a certain proportion of land to the population, effect a serious injury on the people, and amount to an indirect abuse of property right. Upon the lines of State duty and proprietary rights, as above set forth, it seems clearly

within the competency of the State to apply necessary restrictive measures.

The question of property in land has been dwelt on to decide whether there is any special quality in property of that nature which withdraws it from the category of permissible property rights. If it has been fairly and justly considered, the conclusion seems warranted that it involves no negation of conceded ethical rights, that it is needed as the aid to labour or as a means of its application, and that the experience and practice of mankind has sanctioned it as the most effective method of rendering land available for the needs of humanity. Thus it seems to be justified both by reason and by precedent.

When, according to advance in civilisation, in density of population, etc., private occupation of land has become necessary, there still must remain some which is not appropriated, but which is devoted to public use. It may be noted also that the area of public land diminishes with the increase of population. Common lands are reduced in quantity and finally cease to be. And though the public right in waters remains, the banks of streams have been appropriated to commercial use, in accordance with the needs of modern societies and for the general benefit. But there still remains some land not susceptible of individual appropriation, the use of which must be in common. The needs of locomotion, of access to different portions of the earth and even of access to and use of private property, necessitates a system of highways. They are for general and common use. The soil may be vested in individuals without present right of possession, with only a reversionary right in case of abandonment. Whichever method policy or circumstances have adopted, the public right exists to the absolute exclusion of all private rights which may conflict with public use.

While property in highways may be said to be vested in the State, it is so in a restricted sense. Absolute prop-

erty right does not exist. Although a highway may be disused when its need has ceased, and be sold or reverted, yet while it continues a public way no use inconsistent with such public use may be made of it. The purpose of highways indicates the sole manner in which they may properly be used. Any diversion of such use is an infringement of public rights. The State as such holds the property in trust for the specific purpose of its creation. Though no Constitutional restriction interpose in restraint of State power, prescription and purpose define the limitation.

Individual abuse of common rights is rare, excepting as under State permission. The most common violations of public rights appear under the guise of public benefits. Modern methods of transportation seem to justify a new use of highways; but it is a serious question whether they are not an improper use of public property, an exclusion of general public use, and a diversion of such property from its legitimate purpose.

Before leaving the subject of property and the right of property, recent discussion has compelled the consideration of a form of this right or rather a proposed limitation. The proposition has been advanced that, granting a property in the product of labour, an increase in the value of that product not owing to the exertions of its possessor should not vest in him such added value. This claim seems to be presented only against property in land, though it is difficult to understand why it may not equally apply to all forms of property. The value here meant is the only one which in any degree is susceptible of determination, the commercial value, that of sale or payment for use. The value to the owner for personal use cannot readily be estimated. This increase of value may be the effect of a variety of causes, in nature, in public work, or in the progress of general industry. Probably the most common efficient is the influence of

contiguous industries. And as these are prosecuted by persons acting entirely for their own profit and advantage, they can claim no interest in the indirect effect on the property of others than themselves. It is proposed, then, to vest the increased value in the State, as a means of distribution throughout the community. The purpose is not to grant this increased value to those who have produced it, but to detach it by taxation from the property of one who has not earned it by his own efforts. As the public also has not earned it, there is no plea of the satisfaction of rights on behalf of anyone. It is simply deprivatory.

Whether or not this course would be wise or just as a matter of policy, a just and equitable application would be beset with difficulties. In most cases increased value is due, partly to the industry and skill of the possessor, and partly to many other causes in which he has not participated. To separate the one from the other would be a task far exceeding the capacity of any governmental body. Upon this point an object-lesson of the most valuable kind is found in a peculiar system of taxation existing in some places by the name of assessment for benefits. It has a better justification in principle than a general absorption of increase, as the benefit real or supposed comes directly from the act of the body to whom the tax is paid. The theory is that when a public work is done the increased value which it creates should be applied to the cost of the work. The theory is very fair in appearance. The fact is that the taxation founded on it is of a most unjust and insidious character. Recognising the fact that the actual commercial value of any property can be really known only as shown in actual market, and that opinions as to a supposed value will differ very largely, the practice, and the necessary practice, is to estimate the increased values of specific pieces of property within a certain district supposed to be benefited

by the work in question, and by taxation to divert all or a portion of the increase into the public fund. Thus it may happen, and does happen, that the estimated increase may be greater than in fact, or there may be no increase at all. Inequalities of a gross kind may arise. The insidious nature of this tax is found not only in the necessarily arbitrary nature of the assessment, but in the comparatively small area which at any one time is subjected to this form of taxation. If unjustly administered, the protest is too limited to be heard or to be effective. The public is not usually much concerned about the injustice practised by its representatives upon a small portion of itself. The injured portion is in time merged into the general disregarding public, and the same practice may be again employed in some other small section of the community. The possibility of injustice in such a system is immense. If, then, the difficulties of a just appropriation of increase in such a limited and direct manner are so great, the attempt on a larger scale to correct the constant variations of values is a nearly impossible task. Every species of property is liable to fluctuations arising neither from the fault nor by the exertions of the owner. An undue increase of the functions of the State would follow from the attempt to adjust these inequalities. Both the unearned increase and the undeserved decrease may be left to natural causes. Whatever variations may arise from the fraudulent practices of members of the community, or from unwise legislative measures, are properly within the duty of the State to correct. The objectors to certain forms of property look uniformly to State appropriation as a corrective remedy. The vesting of property in a community, instead of in individuals, is equally an act of proprietary right, directed against all without that community. This may be in the form of the older paternalism or of modern socialism, wherein the State as to property is a large co-operative society.

Whether the State may, according to the best conception of its duties, extend its functions thus far is a matter for further consideration in its appropriate place. The restriction of personal liberty of motion involved in the private possession of land may be limited by proper reservations, and by the authority which always remains of acquiring possession for the public use according to correctly devised measures.

There is one species of property of an incorporeal nature which is more than any other the direct result of labour. Yet the products of intellectual labour have been less carefully secured than material things. They have this peculiarity that while retained they are of no value to any but the possessor, but when promulgated may be multiplied indefinitely, and so the real value may be appropriated without regard to the property rights of its creator. If mental skill is applied to the creation of any particular thing, the thing itself as a property may be readily protected; but its value is infinitesimal compared to the idea which there lies embodied, and which may be reproduced in thousands of similar things. Hence it is apparent that property in an idea can only be protected by the direct interposition of the State. But its intangible nature and the facility of appropriation seem to have obscured in the mind of the public the sense of proprietary right. It is probably in obedience to this popular notion that States have failed to give to property in ideas the same degree of sanction and of permanence which has been enforced as to material things. The tenure of copyright and of patent is restricted to certain periods. It may be that the transcendent importance of mental creations to the progress of humanity has urged the limitations of a restricted use. This notion is instanced in the medical profession, which prohibits its members from restraining the free use of such discoveries and inventions as are of service to the human

race. Property of this kind has often been unrecognised beyond the limits of a nation's territory. It would seem to be by no means difficult, and at the same time to be consonant with justice, to place such property on the same footing as all other kinds, subject to such restrictions as both the interests of the public and the rights of the proprietor may make expedient.

A review of the property question impresses these conclusions: that the needs to humanity of the products of the earth, and the necessary application of labour both in the creation and subsequent adaptation, give the idea of property in these results; that some idea of permanence is necessary in order that these results may be assured; that the security of property within certain well-considered methods gives to humanity the most efficient and economical use of the earth and of its products. And it does not appear that land should be excepted from these provisions. But all such rights of property guarded by the State should be subject to the conditions of proper acquisition and of wholesome use.

## CHAPTER V

### SPHERE OF STATE ACTION—*Continued*

CLOSELY allied with property is the means whereby property may be acquired. Nature has imposed on man the need of labour as a means of sustenance and as a further means of obtaining comforts and pleasure. The right to labour, then, is one of the primary rights. As such it is to be supported integrally, with only such restrictions as social conditions make imperative. The duty of the State to guard against interference with this right and to impose only justifiable restrictions is clear. In justifying limitations of primary rights, the burden of proof rests upon the authority imposing them.

The extreme complexity caused by divisions and subdivisions of labour in modern civilisation tends to obscure the proper understanding of the rights of labour. In modern parlance, the very name has been misused. Its signification has been restricted to one class of labour, and the privileges granted to this one class have been permitted to override other equal rights. To mark out a main principle and to detach it from various circumstances which confuse it is a matter of some difficulty. Much confusion also results from a reference to past times. These are to be studied with profit in estimating the influences of certain causes; but to measure those influences, co-existing circumstances must be taken into consideration. A system producing the best results in former periods might, if presently applied, have very different effects. To present conditions, or to future

development promised by existing tendencies, attention must be directed.

Being a right necessary to comfort and even to existence, industry should be left as free from restriction as circumstances will permit. A policy unfavourable to restraint of trade has in this country been generally adopted. In many instances it has been carried to an extreme of non-interference, unwise and prejudicial to public interest. Popular opinion, too, has favoured the utmost degree of individual freedom; necessary restraints have been sustained only where their absolute need has become apparent. This tendency is unquestionably in the right direction. It is easier to correct than is the opposite, and less likely to do injury if carried to extreme, and, in fact, is more in accordance with the just principles on which government should rest.

One class of restraints, which have been justified by long experience as conducive to the general good, needs to be mentioned only to show whether or not they may be included within the justified class; another, wherein both the right and the policy are not clearly defined, needs a larger consideration; a third class, which restrains some industries and fosters others, invites a still closer scrutiny. It is obvious that guardianship of the physical, mental, and moral welfare of a people as far as it is assumed by the State, authorises regulation or even prohibition of certain industries. Those which are dangerous to life or health should be conducted in a manner to avoid risk, or at least to reduce it. Those which affect the moral character of the community may be suppressed, or their injurious features be removed. As to work carrying a certain amount of risk to the public, no precise rule can be stated. Generally, all the known rules of safety should be enforced. These being taken, the question arises: Does the necessity of the work override the risk? Precautions enforced by the State are not only in the

interest of the general public, but are also on behalf of those directly engaged in the work in question, in which the public may not be directly interested. The notion that self-interest is a sufficient protection to the person is fallacious. People need to be protected against themselves, against their own carelessness, or ignorance, or vicious propensities. It may be thought that the duty of the State should be limited to public interests only, and should not concern itself about acts affecting only individuals. Passing for the present the question whether or not that is a just conception of the whole duty of a State, it must be admitted that the consequences of personal actions do not always stop with the person. They may be far reaching, affecting not only the present community, but posterity also. The State may properly regulate both the character of labour and its continuance. The avarice of an employer and the greed of the employed may tempt to a kind and degree of labour injurious to those engaging in it. Hours of labour may properly be subject to State regulations. The question of the employment of minors comes under another head.

Modern economic requirements have effected an extreme division of labour. To so great an extent has this been carried that, while increasing the aggregate of wealth, of comfort, and even of happiness, it has not had a happy effect on those engaged in the minutely divided industries. But the natural result of an ordinary degree of division of labour is to create a mutual dependence among people. Each person produces but a small portion of that which he needs. For everything else he looks to the labour of others. A system of exchanges made possible by a circulating medium has vastly increased the effectiveness of labour. From this condition of affairs it follows that each one, in whatever occupation he may be engaged, is in a measure supplying a public need,—and to this extent the public has an interest in his work.

Upon this ground is based the right of the State to exercise a certain degree of superintendence over various industries. It is authorised to require in some cases a certain quality of work, in some a certain degree of competency in the worker. But the extent to which this power may be carried varies according to the relative importance of the occupation. In those supplying unimportant requirements, the need of State supervision is slight; but when public safety in life or health is involved, and in works of a quasi-public nature, usually monopolies to some extent, preventive measures can hardly be enforced with too much rigour.

In most enlightened States it has been the practice to make a prerequisite of competency in those who undertake to practise medicine, to dispense drugs, to engage in transportation, and to perform occupations of a similar nature. The underlying principle of such restriction rests on the important consequences of errors, and on the fact that it is impossible to know in advance the quality of the work one is obliged to employ. Regulations of this kind judiciously applied are not a regulation of any right of labour, but are in the true interest of the better quality of labour. Occupations of a less important character may be left to the correctional influence of responsibility in damages.

Opinions have varied as to the relative values of preventive or punitive measures. The two are closely allied. The punitive supplements the preventive, if need be, and is based on the preventive idea. The one seeks to avoid injury, the other to effect the same result by the indirect method of responsibility for injury. The latter is not so effective a deterrent, but allows a larger degree of freedom of occupation. Former unwise restrictions, supposedly in the interest of the public, too frequently for the advantage of a class, and always too severe a curtailment of human rights, are no longer to be found in

enlightened communities as a State policy. Strangely enough, something of the kind may now be perceived through the actions of certain labour organisations, accomplishing in fact, though not designedly, that which would as a State action be subject to censure. The duty, as above stated, of applying preventive measures by securing competency where work affecting public safety is undertaken, where monopolies prevent a choice of means, and again when the public is unable to ascertain in advance the competency of those it is obliged to employ,—this duty clearly resides in the State. But whether the same preventive measures should be applied as to occupations not having this marked character, is a nice question of policy wherein conflicting interests are involved. On the one hand is presented the interest of the individuals as such, on the other the interest of the aggregate of individuals—a contest of the many and of the few. An unrestrained right of engaging in any one occupation, or of changing it as often as may be, is considered just, according to the tendency of modern policy, even where the rule of the majority is of the strongest. A qualification for the work which one undertakes might be required in the interest of the people dependent on that work. A more comprehensive view of this question suggests that as the material prosperity of a country depends in great measure on the thorough and complete manner in which its various industries are conducted, the policy of encouraging industrial skill is for the best interest of the whole country. In the minor industries it might be wise to offer certain incentives to competency in any occupation, giving at the same time full scope to personal freedom of action. In political offices the requirement of fitness has come to be thought essential for the proper administration. In all political systems the right of the few and the right of the many will need to be harmonised. Their equilibrium is a constantly recurring problem.

The right of labour does not apply to any industries of an immoral character, or to those whose tendency is injurious to public good conduct and general welfare. The conclusion must be that here the power of the State is absolute for regulation or prohibition. Human propensities are such that certain occupations of a noxious character exist in spite of attempts at repression. Recourse must then be had to measures reducing the evil as much as possible. It is not necessary to recur to restrictions imposed on industries under the older forms limiting the right of practice to certain localities, or within certain corporations or guilds, effecting a violation of equal rights. But of another present class of restrictions, limiting the practice of labour by special licenses or charters, and of those resulting from a special legislative policy, the need remains to discuss their justice and wisdom.

Industries of a public character may be divided into two classes: those which supply a public need, and those which permissively do a State work. In the first class are common carriers, innkeepers, and others of a like character. The peculiarity of their works is that they are not conducted solely in the interest of the operator. Their public nature requires that they should be used in the manner which public necessities demand. The State properly permits such enterprises by special charters and licenses, restricting, if necessary, their number, and regulating their methods. Such limitations come from the nature of the work and are in the interest both of the public and the operator.

A more stringent rule is applied to work of a more general character, which may be performed by the State through its own machinery, or may be deputed to persons or associations. So paramount is the necessity of such work, that for their purpose private property may be assumed by virtue of the State's right of eminent domain. The methods by which this right should be

exercised will be considered elsewhere. Works of this general character, intimately affecting the whole community, are properly either a State action or are to be operated according to the rules which the State may impose. The practice of nations has varied. In some the structure of government and the character of the people make it convenient that the State shall itself perform these duties. In this country the policy, probably to the present time at least a wise one, has been to limit the sphere of State action to the utmost. Accordingly, private industry is constantly applied to public works; but it is evident that such cases, though operated by private persons and by private capital, are not for the profit only of those conducting them, but are in effect doing a State work. It has been too much the practice to ignore this fact, to consider them as private enterprises, and to permit public comfort, and public safety, to be subject to the risk of personal avarice. To so great an extent has this view been carried, that immense works, closely affecting the interests of the whole community, have been conducted by associations organised under a general law and open to general competition. A general railway law or a general aqueduct law is an anomaly. Industries of this class do a State work and can exist only by a State prerogative. The offices which they perform cannot be multiplied by the desires of those who wish to perform them. They are limited by public necessity, and this fact stamps the character of the charter. Each particular work of this kind exists only because the public need demands it. The purpose of its existence alone justifies its creation.

State action in pursuance of certain policies may have a direct or an indirect effect on special industries or classes of industries. Imposts, bounties, and subsidies, all have some disturbing effect. Customs duties are the most extensive, and are far-reaching; they therefore de-

serve consideration as to their influence on rights of labour, and as to their justification according to the principles heretofore stated. They operate in a three-fold manner, though varying according to the object to which they are applied, and according to the circumstances of each special case; and it may be that the threefold effects are not always present. They serve as a taxation; as a restraint, or even a prohibition, of certain industries; and as a creation, or a fostering, of others. Whenever imposed, they effect an interference with established rights of industry, and therefore like all acts of similar effect must justify their disturbance either by a consonance with the general right or by an imperative public necessity. Methods of taxation are to be treated of elsewhere, but it is proper to notice here a peculiarity of this form of taxation. Secrecy is a marked feature. No one can know what proportion of the burden he may be called on to bear. It is open to the objection of inequality, and its secrecy disarms protest. A protective system is not based on the need of revenue. Its purpose is to make possible certain industries which otherwise could not profitably exist; in so doing it is liable to grant undeserved favour, to bestow undue profit. A nice adjustment of duties to encourage a needed industry, without unnecessary advantage, with the least disturbance of other industries, and with the slightest burden cast upon the public, is a matter of extreme difficulty. But however well adjusted, there must be a granting of special privileges to some forms of work, a restriction upon other forms. Governmental interference always disturbs the commercial and industrial equilibrium. The safety and welfare of a country may need the development of certain kinds of work. It is, however, probable that increasing international communication is rapidly reducing the number of such needed enterprises. As protective measures grant unequal advantages,

and impose restrictions upon the general rights of labour, their justification must be found in the general good and the obvious needs of the whole community. In every act of this kind the burden of proof as to its justice and wisdom rests on the administration imposing it. Bounties and subsidies are a more direct and open form of the same purpose, and should be justified on the same grounds. Their errors may be more easily detected; their benefits may be more easily perceived.

The duty of the State does not stop with the avoiding of interference with the rights of industry: it guards against infringement of these rights from whatever direction it may come. The ordinary methods of protecting the rights of industry against individual attack are well established. The protection is not only material, but also guards moral reputation as a foundation of successful industry. For some time past much prominence has been given to interferences with industrial rights by organised force, under a claim of right. They are said to arise from a natural antagonism between labour and capital. It is questionable whether this is a correct description of an existing condition. Labour and capital are more nearly akin than is generally supposed. What are called the lower and the higher forms of labour differ in a quality which has a close resemblance to capital. The comparative values of kinds of labour depend on the degree of skill with which they are endowed. This endowment is the product of previous labour. The higher forms of labour are the result of long training and practice, and there is no form of labour so simple as not to be capable of increased value by the power of added skill. This augmented value is a kind of capital. Labour and capital are ultimately associated and rarely entirely separated. That form of capital against which labour commonly complains is always directed and utilised by intellectual labour. So clearly are the two connected

that harmony is the natural state, antagonism an exceptional disturbance of the relation. In former pages capital has been described as a storage of labour, a product having varied degrees of permanency. That a fixed permanent capital should exist is due to exchange, made possible by that valuable invention called a circulating medium.

Money is said to have no value in itself, to be only a means whereby values are transferred. If this were true, money would hardly be able to serve its purpose; it would lack the very stability which makes it effective. Suppose a condition when barter, proved to be a clumsy and inefficient mode of exchange, is to be superseded by an instrument of exchange, and that instrument to be gold. Like many other articles, gold, extracted from the earth by labour, has a value estimated in the same manner as that of other products. But when selected for a circulating medium, on account of its peculiar fitness for the purpose, it acquires an entirely distinct and separate value. The peculiar value created by the function of exchange might also be applied to some other object of little value, whose cost of production is slight. Government stamp and the legal tender quality make paper answer the purpose of money, but it lacks that quality which makes gold adaptable. Paper is capable of indefinite expansion and can have no money power except in the country where issued; its value is dependent on State authority and responsibility. The peculiar usefulness of gold as a medium of exchange, aside from its permanency and slight liability to fluctuation, lies in the fact that it has in itself an independent value based on quantity and cost of production and of adaptation. The value varies in fact, though nominally constant. All other values are expressed in standard coin, and conversely the value of coin is expressed in the value of all other products. A circulating medium, then,

may have two values, a real and an ideal one; and the real gives stability to the ideal value. By the power of exchange and adaptation to varied needs, and of conversion at all times into a permanent and ever-available equivalent, the product of labour takes on a somewhat permanent character. Though the term "capital" includes all accumulated product, material and intellectual, common usage adopts only that which has acquired a certain permanency, and from the use of which profit is derived.

It has been stated that labour and material combine, in varying proportions, in the creation of a product, and that the term "capital" is applied to material, the product of previous labour. If there be any exception to the rule, it is to be found in the higher grade of intellectual labour. Capital, except for consumption, is of no benefit to its possessor unless utilised by the application of labour. Labour effects little or nothing without material on which to expend itself. Their union is essential to production. When labour is the property of one person, and capital the property of another, the union may be effected in two ways. The labourer may pay for the use of the material, or, what is the same, may pay for the use of money expended in the purchase of material to which labour is to be applied; or the owner of material may pay for the use of labour to be applied to capital. The product, the joint result, contributes of its profit a part to labour and a part to capital, but by very different methods. The idea of a just apportionment of this profit has excited much discussion. But apportionment is not the method by which these different interests are satisfied.

The interests involved in these ways of uniting labour and capital differ in character. In the one case there is simply a letting for hire; in the other, an actual property in the product. In the first assumed case the labourer pays an agreed price for the use of the material, which in

itself or its equivalent is to be returned to the owner; and this price is described as rent, or interest, or hire, according to the nature of the material employed. In the second case the owner of material pays an agreed price for the services of labour to be applied to the creation of a new product; and this price is described as wages or salary. In either case the one who receives pay for use or service acquires no interest or property in the product, but receives a determined price independent of the value of the product. The one who pays for the use of services or of capital is the owner of the product, and his profits are dependent on what may be the value of the completed work. This value is not directly influenced by the price paid for labour or for the use of material, though they both are important factors in the cost of a product. In some cases a lien in the final product may be imposed by agreement, or a partnership in the profits may be created. Here the two interests are assimilated by act of the parties.

A misconception of the true relation of these interests often results seriously. Although these two interests have this necessary association, they are, owing to the commands of self-interest, frequently antagonised. The borrower desires to pay the lowest rate of interest, and the lender seeks to obtain the highest rate which the circumstances of competition will permit. If labour is the borrower of capital, it pays no more than the current rate of interest; if capital is the borrower of labour, it pays only the current rate of wages. Neither concedes much to benevolence. The greatest intensity of opposition is usually manifested in those industries where capital is the payer of wages and the owner of material and product, though this condition in its entirety is rarely found. The employer usually applies his own skill in the prosecution of his enterprise, and is frequently a borrower of capital as well as a payer of wages. Though capital is

unproductive without labour, and labour obtains no profit without capital on which it may be employed, a failure of agreement between the two effects a separation of the union, of greater or less continuance, and consequently a failure of profit on both sides. It might naturally be supposed that the ordinary laws of values would determine the question, but a real or supposed self-interest serves to prolong the difference. In a contest of this nature the advantage has been on the side of capital. It can afford to wait,—and the vast increase of individual or corporate wealth has augmented the advantage. To counteract this power, trade organisations have developed, thus opposing strength to strength in the effort of each to seek its own advantage. While this opposition continues, each side may be acting within its just rights. Too often it does not stop here, but extends to attacks upon property, and, strangely, also to attacks on the rights of labour by the force of labour. These disturbances have been intensified by a false teaching, which easily impresses on unintelligent natures the belief of a vague claim upon, or property in, that to the production of which labour may in any degree have contributed, unmindful of the fact that labour and capital in this relation receive each its compensation in a different manner, and that participation in profits implies liability to losses. Nothing excites the combative nature of man more than a sentiment of violated rights. An erroneous idea of right is as real to the holder of it as if correct, and is maintained with equal tenacity.

In these conflicts of interest, real or supposed, what office may the State perform in their settlement? The questions herein involved are the rights of property and the rights of industry,—of property in material on which labour is to be expended, or in the completed product,—of industry free to expend its force when and where it please, and to receive its agreed reward. It is difficult to

recognise any claim which demands a restriction of either of these rights. The relations of capital to labour are natural ones, and may be left to the operation of natural laws. Except in the maintenance of established rights, governmental action has uniformly been hurtful. A State prohibition of giving or taking of wages, beyond an amount fixed from time to time, has been known to disturb natural relations for a century or more. The prohibition of receiving interest on a loan beyond a fixed rate, in spite of the needs of the borrower, still continues as a reproach to legislation. The various restraints on property and on industries, heretofore existing, have been futile of purpose and injurious in effect. It is possible that unwise action in fostering certain interests at the expense of others, and in granting inequitable privileges, may aid in producing the conditions against which a remedy is sought. If the strained and unnatural relations of labour and capital are due to such causes, the causes should be removed. Other than this there seems to be no basis on which State actions may be founded, and no remedy without a disturbance of existing rights both of industry and of property. Direct methods of State action having proved always mischievous as well as unwarranted, good effect may be looked for only by the indirect methods of granting perfect freedom of action, within just limits, and of rigidly sustaining all just rights, and by such other modes as tend to the improvement of national character. Nothing but enlightened self-interest, directed by a sense of justice, seems able to avert the clashing of interests supposed to be averse, but which, being mutually dependent, should act in harmony.

It has been shown how the complexities of modern societies, with much divided industries, and consequent dependence of man on man for the necessities and comforts of life, establish multitudinous relations between persons which in a more simple society would not exist. Their

relations and mutual dependence give rise to frequent agreements between persons. The power, then, to make such agreements comes as an incidental or secondary right derived from social relations and industrial needs. The State may then recognise this right, and may maintain it subject to necessary limitations. This right cannot be placed on the same footing with ethical rights. It does not originate directly from man's nature, but is in aid and support of ethical rights. Hence the obligation of State support is of a different kind. The scope of limitation is greater. The right of contract is an objective one, and the duty flowing from it is not, at least so far as the State is concerned, a subjective self-obligation, but goes only to the extent to which the interests of others are concerned. The moral obligation of a promise, as such, has not been the subject of State enforcement, as it concerns only personal duty, and does not, directly at least, affect the community. The obligations of a promise must, in order to be recognised, affect the interest of someone besides the promisee. The definition of a contract is an agreement, upon sufficient consideration, to do or not to do a specified act; and it is well to add, an act not prohibited. The definition sets forth the extent of State jurisdiction over a promise. Mutuality is an essential element. Consideration implies that he who confers a benefit on another likewise receives a benefit from that other and that these mutual benefits sustain each other, being each a part of one agreement. Sufficiency of consideration implies a certain relation of values in the corresponding benefits. Systems of jurisprudence have enforced the performance of contracts even when no consideration is to be found, provided the promise has been expressed according to certain prescribed formalities, distinguishing this from mere naked promises, as they are termed. The supposition is not that the formality implies a consideration in the sense of taking its existence

for granted, but that it implies a certain deliberate purpose without a thought of subsequent retraction. This provides for cases where, though no consideration may have been expressed at the inception of a promise, yet the promise itself has been the ground whereon subsequent action has been based. It is proper that some degree of solemnity should be required in a promise thus enforced. It is proper also that a prescribed formality should be an actual deliberative act, and not a trivial ceremony. There was a time when the act of affixing a seal to an instrument was a performance of some degree of solemnity; to-day, it is an act of the most trifling nature, yet it still serves to mark an important distinction in the character of instruments,—an instance where a rule continues when the reason for it has departed. In spite of some errors, more of practice than of principle, the Civil Law and the Common Law in the matter of contracts express the correct idea of the extent and limitation of State duty. They are in the main directed by the following guiding principles. Stated in general terms of a mutual agreement, a contract may include every transaction of which persons are capable, may extend to an indefinite time, may be unequal in its terms. But in none of these ways does the State regard contracts as illimitable. Contracts, being agreements between persons concerning the various rights which appertain to persons, are necessarily subsidiary to such rights, and not in derogation of them. The State, then, does not enforce or permit agreements which oppose established rights, and, by a stronger reason, those which are criminal or of vicious tendency. Contracts being in the interest of the contracting parties only, the obligation is founded on a benefit expressed by the term "consideration." But a wise policy may enforce an agreement without consideration, if made with certain formalities, thus justifying action based on a formal promise.

A certain limit of time for the performance of an agreement accords with the nature of an obligation. During the pendency of a contract, freedom of action is suspended. A wise and prudent policy may limit the period for enforcement within a reasonable time, to be determined by the nature of the agreement.

Certain rights arise from the natural relations which exist among human beings, and the most conspicuous are those flowing from the relations of the sexes, giving rise to marriage and the parental and filial relations. The consensus of opinion in all highly civilised communities has fixed upon monogamy as consistent with human welfare, and alone entitled to State recognition and support. It may be assumed that the right to enter into such relations appertains to all. But, like other rights, this has its limitations, and the State may, therefore, impose such conditions as the welfare of the community may require. The universal nature of this right is acknowledged in most systems of jurisprudence, by prohibition or personal agreement in restraint of marriage. The restrictions imposed by the State should be in the interest both of the individual and of the community, so far as they are identical. Many evils may come from unwise marriages. Examples are numerous. Race deterioration, both physical and mental, is one of the results. Heredity has proved itself an important factor in civilisation. Its action is intricate and but little understood. It seems full of contradictions and anomalies. Yet to all who appreciate the universality of law, such anomalies are only apparent, and indicate a lack of knowledge of the principles involved. In the main, the fact of transmission of qualities is admitted, and this indicates the important part which heredity plays in race progress. As far, then, as it is possible for a State to guard against evils of transmission of bad qualities, its duty is sufficiently indicated. To a certain degree, this has been the practice of most

States. Following the rule of the Jewish Theocracy, marriages within certain degrees of consanguinity have been prohibited, and the age at which they may be permitted has been prescribed. The purpose in both of these cases has been to guard against race degeneration, and in the latter case against the material injury of insufficient support of offspring. As a general fact, restrictions have not been sufficiently extended. Disease, physical incompetency, insanity, mental imbecility, and poverty are the common results of marriages which never should have been, owing to the unfitness of those contracting them. If the justification of State restriction may not rest on the broad ground of race improvement, it may be based on the danger from crime, on the task of protection of the insane and imbecile, on the expense of pauperism, the consequences of unwise or improvident marriages. That States will ever go to the full degree of prohibition which a wise policy guided by the teachings of science would dictate, is impossible. Sentiment militates against it; the idea of personal right to follow the dictates of fancy opposes it; passion contests it; the influences of social custom are powerful in opposition. Yet it is wise to point out the direction in which States should advance in the improvement of humanity and the perfection of a community. The measure of this advance will be found in the knowledge of the principles of heredity, and the degree in which the conditions of a specific society will permit of their application.

The revocability of the marriage contract is an attendant question. Upon this subject there is a great diversity of opinion and of practice. It is one of the unsettled questions of the age. Theology opposes it, but the extreme of civilisation favours it. It is safe to say, as in almost all questions, that the true policy lies between the extremes, with an inclination, as it seems, in this case, towards irrevocability. The possible disruption of existing

relations is always attended with risk and inconvenience; hence justifiable only by the strongest reasons. In fact, the whole subject of the domestic relations is so interwoven with other matters concerning the social structure, that it can be viewed only as to its harmonious relations to those others. It is thus within the province of jurisprudence. It lies within the scope of this treatise to point out the permissibility of State regulation, and the direction which such regulation should take.

The difference of sex suggests a highly important topic of consideration,—the relative position and the social status of the sexes. The manner in which women have been regarded in any nation and at any period is one of the best indications of advance in true national worth. The Teutonic branch of the Aryan family, especially the Saxon people, have been conspicuous in ruder ages for the esteem in which women were held; and this seems coincident with the possession of those solid qualities which have given these nations a foremost position in the community of nations. These peoples are at the present time in marked contrast to other peoples in the manner in which the female sex is regarded. They show a higher appreciation of the better qualities of which the sex is capable. There is less of chivalric devotion, of passionate expressions of admiration, and of mock homage; but there is a truer deference, companionship, and recognition of larger capabilities. The women of a nation impress a national character. They are the earliest instructors; their moral influences on youth affects its quality in after-life. It is thus evident that upon the degree of feminine elevation depends in large measure the character of a community. Their ethological influence is immense.

History shows in varied degree the constant subjection of the female, a consequence doubtless of physical inferiority. Naturally, then, its subjection is the most

marked in those ages when the physical powers are the most prominent, when the intellectual powers have the least sway. The relations of the sexes vary as to the relations of these contrasted powers. The menial offices were the lot of woman in the rudest ages. Her position improved with advancing civilisation. The status of woman in what is called the age of chivalry was a curious one. It was supposed a flattering one. According to modern views, the flattery would scarcely be appreciated. A fantastic and artificial age it was. Truth was of little consequence. The virtues were so strangely upset that their relative values were obscured. Among other falsities, the false position of woman was carefully elaborated. Caprices were approved and indulged. A mock deference gave a distinct encouragement of weakness and a consequent discouragement of the higher qualities. The effect of this system on the female sex has been somewhat similar to the effect of certain theological systems on the human intellect—namely, to promote progress, and at the same time to impose restrictions difficult to escape from. Where the chivalric tone prevails at the present day, there the higher progress of woman is hindered. A long period of subjection has impressed its fitness upon the feminine mind, and imposed a consequent disapprobation of any departure from accustomed conditions.

That such subjection has been made possible from physical force, gives it no sanction. Continuance creates only presumption. Recent experience may combat precedent. From the observed nature of the sexes, and guided by experience, one may determine their respective rights and duties. Although historical instances of superior ability in women have been quite numerous, they have been relatively few, have appeared only as exceptions to a real or supposed law. Owing to circumstances difficult to explain, recent times have given opportunities to

women to show capabilities greater than heretofore attributed to them. Of these opportunities they have availed themselves. A superior moral tone has always been acknowledged; an improved intellectual tone, force of character, and ability in affairs under new conditions, have compelled a revision of opinion, and a changed estimate of the relative position of the sexes. There is no reason to suppose that changed relations will work a destruction of harmony. On the contrary, increased mutual respect and appreciation of worth should effect a more healthful relationship, and a more wholesome companionship. With the fullest development of which the race is capable, there is no risk of either sex trenching on the prerogative of the other. Nature has defined the bounds.

The status of woman has usually been defined more by social considerations and public sentiment than by political reasoning,—and the State has usually followed the lead of general opinion. This does not accord with the correct methods of Political Science, which should derive its principles from the nature of things as found to be. The customs of every country impose certain restrictions upon the female sex; but as to the State, it is difficult to see that all rights based on ethical considerations are less applicable to woman than to man. Apart from special conditions, their rights are equal. Political rights are not of the same order. The question of expediency and of fitness enters largely into their origin. While the ethical rights and duties are of equal application, the structure of political society may differentiate political rights, and the condition of marriage may alter civil obligations. Granting the fullest liberty as to ethical rights, the degree and manner of their enjoyment may be left to natural fitness and natural inclination. Political privileges and duties have not the same basis as ethical rights. The falsity of the theory that any member of a community has an inherent indefeasible right to an equal participa-

tion in political duties is apparent when both reason and experience show that the admission of this claim might be fatal to the end for which government exists. Upon this ground may the question of concession of political rights be discussed. The different position which the sexes must occupy in the affairs of life should enlighten the question of participation in political duties. The sphere of woman's activity differs greatly from that of man's. It includes the quieter and gentler duties, distinct from, but not less important than, ruder occupations, some experience of which seems an indispensable requirement for political actions. If the State gives political rights, it also imposes political obligations. The requirements of the social life of a community are also to be considered. An enforced disturbance of natural duties may affect the harmony of social existence, and at the same time diminish the efficiency of a political system.

That the status of woman must be modified by marriage, is obvious. Marriage and the family implies association, and association implies direction and government. The common practice of mankind has given that government to the male sex, and the nature of the sexes seems to justify the grant. But it must also be admitted that the authority thus given has often been so enlarged as to permit abuse. The modern tendency is in the opposite direction, and is liable, if too much extended, to defeat the purpose of family life and the harmony of relationship between its members. The true rights of women will be best assured by such a degree of submission in the married state as the relation necessarily imposes, with a due regard for ethical rights, and by a freedom from political duties for which she is unfitted by habit and by inclination. That the conditions which give direction to State action in this matter should be altered, would imply a radical change, which neither the history

of the past nor our own conception of law would lead us to expect.

The parental and filial relation, with the correlative duties of support and obedience, has its most perfect conditions where the monogamic state exists. If the care of the State should be proportioned to the helplessness of its object, that care should be largely extended to women, still more to children. State supervision of children during a fixed period of minority is a duty of paramount importance. The ordinary duty of enforcing parental support, of special guardianship in case of parental incompetency, and of the care of property, are ordinarily sufficiently well performed. But the State falls short of its complete duty if these are the limitations of its care. A measure of this duty is found in the evil results of its failure. Frequent allusions have been made to the character of a community as being the aggregate of qualities both good and evil which give tone to the community. This is not a constant quality, but is subject to change and susceptible of improvement. The most effective mode of improving the character of a people is the care and development of its youth. The existence, and more strongly the increase, of an uneducated, improvident, or criminal class, is an evidence of State neglect. An additional evidence is found in the fact that private charities are often found doing a work not only of relieving the wants of the youth, but of improving their character, and fitting them to become useful members of society. The economic effect of work of this nature is evident. State action is simplified and perfected, as the object on which it acts is improved. The form of paternalism which guards the material and moral welfare of the young, and as a consequence elevates the character of the nation, is above criticism, excepting as to the manner in which it performs its work.

The general experience of mankind has shown the

need of recreation and diversion as a preservative of the moral and physical tone of the human constitution. The simultaneous demand made upon an ancient State for sustenance and recreation is of frequent quotation. Older governments recognised an obligation to furnish to its people diversions and amusements, which modern States do not admit. It would seem that matters of this nature might be left to the disposition of the people themselves, that State intervention would be more hurtful than useful, that its action should be confined to the suppression of evil forms of amusement, and to the protection of the harmless forms. There may be circumstances to justify a more active movement in this direction. It has already been noted that people need to be guarded against their own avarice and greed, and against that of others. Needed rest and recreation will often be sacrificed to the demands of profit. The complication of affairs requires unity of action. It is accordingly within the province of government to prescribe certain days for either permissive or compulsory abstention from labour, and to provide public places for general wholesome recreation. Such would ordinarily be without the power of the individual to obtain. All such provisions should be of the most general character, avoiding inequality and special class privileges. The more comprehensive their character, the more nearly do they include the wants of those who have the greatest need of such provisions.

A comprehensive survey of the human constitution recognises the existence of an aesthetic faculty, a perception of the beautiful in the varied ways in which beauty presents itself. It perceives that this faculty, like all others, is capable of improvement and development, effecting a refining influence, and going to complete the sum of human faculties. The spirit of this work has shown a tendency toward the limitation rather than the extension of governmental functions, and therefore

toward the opinion that the enlarged development of the human faculties is not within their purpose, unless justified by general needs. But it is to be assumed that many things which may not be done directly, may be done indirectly, in union with others which are permissible or required. It has been too much the practice to separate the useful and the beautiful. Nature unites them; man divorces them, and seems to find an antagonism between the two. In truth, the most beneficial office of beauty is to adorn the common things of life. The beautiful alone is selfish and exclusive; united with the useful, it extends its influence into the remotest corners. Thus the State, in such works as are directly within the line of its authority, may unite use and beauty, exerting at the same time a material and refining influence.

The strongest force which has influenced the actions of men, and directed the current of history, is the religious sentiment. Its universality and its strength has made it an important factor in the construction of States and the moulding of society. To comprehend this force demands the study of the abstract religious idea apart from the various forms which it assumes. In all ages and among all people this idea has existed, ruder or more refined in its conception as the people among whom it is found. Its essence lies in the perceived insignificance of man amidst the powers of nature, and in natural sequence the conception of a greater power ruling over the destinies of the world. From this ever-existing conception the evolution of the religious idea might readily be predicted. The first step would be the deification of the powers of nature, a recognition of forces superior to man's control, and the notion of a distinct special intelligence directing each force. The most complete system of many deities is found in Grecian mythology, where, in course of time, the religious feature came to occupy a secondary place.

The personification of every force, influence, and action has a poetic inspiration. Among the more intelligent classes there seems to have lain, back of the mythology, the conception of a grand superior force, the deities described by name being only a poetic figuring of nature's actions. The inscription "To the Unknown God" expresses this conception. Progress is found exactly as the idea of divinity recedes from its nearness to man, till it gradually reaches the ultimate conception of the supreme deity without intermedium. A peculiar mental trait is the tendency, almost impossible to escape, of ascribing to divinity human attributes, of creating a God in man's image. The Greek peoples the world with divinities. The Hebrew clothes the one God with human weakness and imperfections. In all times and among all peoples is found the disposition to create something intermediate, more nearly allied to humanity, more tangible and easy of perception. The ancient lesser gods have their counterpart in the priestly notion, in forms, in ceremonies, the material being more readily appreciated than the ideal. The sacrificial idea, always existent, is an instance of the degradation of the religious idea. There is always in action a conflict between the disposition to elevate and refine religion on the one hand, and, on the other, the disposition to reduce it to the level of man's ordinary capacity. As the one or the other gains, will religion be exalted or debased.

The universality and the fervour of the religious idea necessitates its being taken into account in all human affairs. It affects all things, and whatever it touches it intensifies. In the abstract its essence is the recognition of a supreme power, the obligation to obey the understood behests of that power, and in addition a gratification in such obedience arising from a satisfaction in duty performed. If these are the essential features of the religious notion, it is evident that the largest latitude in its forms and methods is

allowed. Theological systems are numerous; conceptions of duty enjoined by different religious systems vary with the age and with the people: yet in the varieties which the intellectual and the emotional nature of man has induced there is ever present the essential idea without which religions as we perceive them could not be. The purpose here of exhibiting this fact is to show that, both by its universality and its intensity, religion exerts the strongest influence on political and social existences; and again to notice an inherent human right which the State cannot ignore. Of religious intensity and fervour, abundant testimony may be found. Whether it operates for good or for evil—for good, as in multitudinous acts of beneficence, often carried to the extreme of self-sacrifice; for evil, in the bitterness of hatred which has made religious wars and religious persecution the most merciless of all human inflictions,—the supreme importance attached to religion, its transcendence above all other affairs, the depth of emotion which it invokes, explain its constant force. Association gives added power, and association, with the strength which unity confers, always resists change, and in resisting change resists progress.

The numerous systems and practices, all existing under the one imperative religious idea, show, as history evidences, the possibility of their coincidence with a false morality. Together with various theological systems are various ethical systems. The notion of obedience to the behests of an acknowledged supreme power leaves open the question of what those behests may be. Without a special and minute revelation, acts and duties, supposed to be enjoined, must accord with the theological system in question. Either the system itself prescribes certain acts, or general right action is obligatory. In the latter case the peculiar notions of morality, existent at one time and among one people, are supposed to receive the sanction of deity. This explains how, under the

same theological notion, religion may at different times sanction different ideas of duty. Religious sanction often follows the lead of ethical principles, and one age may condemn acts which a prior age has sanctioned. The principles of right are eternal and immutable; man's conception of them changes. There is often an elaborately constructed order of religious ceremonial and of personal observances, considered of vital importance to the present and future life of those affected by them. Here, then, may be found, side by side, two religious conceptions: one, that the laws of morality as understood are enjoined by deity, and one, that certain sacramental acts are equally enjoined. It is within the region of fact that the two notions may conflict.

The third religious element which intensifies the others is the personal sentiment, the emotional feeling, supplying a force which conquers all opposition. Amidst the varieties of theological and ethical notions error must be common. The effort to effect purity in both must be continual. Unfortunately, there is that in man's nature which combats this effort, a centrifugal force causing divergence in all directions from a central standard of purity. The very purest faith does not long continue uncontaminated by error. The Christian religion, itself the purest in its essence ever conceived or even conceivable, did not long remain untainted by corruption. Human propensities have ever been at work to disturb its simplicity. The direction of reform must always be towards its pristine condition.

The universality of the religious sentiment is strictly that which brings it within State jurisdiction. It is that which gives it the character of a right, being a part of man's nature and as such entitled to State protection. But does not the sacred character of this right distinguish it from all other rights and make it illimitable? The previous analysis has shown the prevalence of the religious

idea and the fact that within it may exist many creeds and practices, that the same powerful sentiment may incite the best deeds and the worst. Of the many qualities which form the character of a community, one is the moral tone, the aggregate of opinion on ethical questions. Whatever violates this tone endangers the State, the more strongly when it appears directed by the force and energy of religious sentiment. An utterly erroneous religious faith appeals to the strongest feelings of its believers with as much force as does any other. The position of religion within a State, then, is that of accord or of antagonism. There is a natural classification of religions. Those differing only on points which do not excite the strong emotions may dwell together within a political community. Religions of extreme difference cannot dwell together and must find their abode in countries of consonant ideas. These facts impress upon all States, to a limited degree, a religious character, but only to a limited degree; for the duty remains to recognise the general right of religious belief and practice, to award them the fullest protection consistent with that moral tone which the community have adopted, consistent with peace, which jarring religious factions may endanger, and consistent with the State's duty of self-preservation. In larger affairs the general religious character of the country is to be protected; in smaller matters the predominant belief must control. A Christian community cannot sanction the Mohammedan practice of polygamy, nor enforce the Jewish Sabbath.

The slight degree of religious character which thus far has been ascribed to States has nothing in consonance with that attaching to the union of Church and State. As the union has occupied a prominent place in history, and has occasioned much difference of opinion, it will be necessary to consider if the respective purposes of religion and politics are so nearly allied as to make this

union profitable to both. A writer has divided religions into two exhaustive classes—Ethnic and Catholic. Ethnic, where a nation and its religion are defined by the same bounds; and Catholic, where religion is susceptible of propagation, and may include people of all nations and of diverse qualities. In this sense modern religions are Catholic. The religious idea permits many sects, and this word implies a separation, or a distinction, from a larger body. The Church represents the distinctive body. The purpose of the Church is to sustain a creed, to define the boundaries of its own body—a unifying office. It must therefore have a narrowing tendency, a limiting influence. The intent of the State is to include all religious beliefs not discordant with the character of the State. It is fair to infer that the union of bodies having such opposite objects in view would be detrimental to each. The facts of history sustain this inference. Whatever historic causes may have led to this union, it is not difficult to define the profit which it might have granted to each. Greater strength would be secured, but this strength would not favour the true purpose for which each should exist. The State would gain the power which religious sanction affords, but a power in excess of its just needs and liable to corrupt use. The Church obtains temporal aid in enforcing its precepts, but does not impel conviction. There is a frightful record of persecution fostered by the union of two bodies created for opposite results. The union has opposed both civil and religious reform. The English revolution and civil war in the middle of the seventeenth century is a puzzle to readers. In its inception it was an effort at Constitutional reform. It developed into a fierce contest of religious factions. The reaction at its close was perhaps the product of the bitter emotional nature of the struggle. America, in spite of the early hierarchical attempt in New England, has escaped the

retarding influence of this unnatural union. Religious toleration is the practice of modern States. Yet in many cases States support or enforce special religious beliefs. The civilised world has not yet learned to restrict the office of the State to its legitimate sphere, nor has the Church fully realised that not by force but by conviction must its faith be impressed upon the human soul.

One of the legitimate offices of the State is the care of those of its citizens whom misfortune has denied the ability to care for themselves. The insane, the injured, even those who from a variety of causes lack the power of self-support, are entitled to the charity of their fellow-beings. Most of this will be indubitably the work of private benevolence. The need of systematic charity may properly impose this duty upon the State.

A comparison of the intellectual faculties of man and those of the lower animals exhibits a marked difference. Instinct, extremely limited in man, is a prominent feature in the lower animals whose faculties, though susceptible of external cultivation, are bounded by the simple needs of their being. In man, instinct plays a very inconspicuous part. No animal relies so much on others in early life, on the development of his own powers in after-life. Intuition expresses unconscious cerebration, and evidences faculties capable of improvement. A marked distinction of man is the capacity of self-improvement. The evolution of animal life in the main is the product of natural causes. Whatever may have been the origin of man, he occupies a distinctive place in the fact that his development comes from the exercise of his own faculties. But the power and the disposition are not always in accord. The intellectual history of man shows a gradual advancement; it also shows a tendency to relapse. The intellectual and the animal propensities are often in conflict. Progress is the result of constant effort. Education is the process affecting this result.

The right of the education of one's self, or of those intrusted to one's care, is inherent. This right the State must recognise by protecting its exercise. Thus far State action is merely permissive. The power, to go farther, to enforce its exercise, or to grant direct facilities, does not rest on the same right. It must be sought elsewhere.

The office of government will be simple or complex, easy or difficult, very much according to the character of the people to whom it is applied; and the possibility of advanced governmental systems will depend on the same conditions. It is, then, a wise policy on the part of the State to simplify its task by elevating the mental and moral condition of its people by judicious education. This is a measure of public safety which reduces the tendency to crime and qualifies people for a higher degree of citizenship. This policy seems so evidently wise as to constitute it one of the primal State duties. The method by which it may be pursued will be governed by the circumstances of the case. Intended to apply to those who have neither the inclination nor ability to educate themselves, to that extent it may and should be compulsory, requiring a certain standard to be attained, whether it is reached voluntarily or under State provision. We cannot assume the existence of a right on the part of the people to demand education by the State. Education is a wise policy for the public good. The claim of any body of people for State assistance on the ground that it is pursuing an educational work, according to its own methods, and not subject to State superintendence, is inadmissible. The State acts with its own methods and in pursuance of its own purposes.

Certain pertinent questions may arise as to the degree and the kind of public educational work. Guided by the purpose of the educational policy, it should be as general and comprehensive as possible, embracing all who

have need of its beneficent aid. The burden which this may impose on the community precludes the idea of a high degree of education in general. Its object being the general elevation of the people, and to furnish a foundation for the ordinary avocations of life, that object will limit the educational process. This is its primary and imperative purpose. A secondary one would be the providing a higher education for those who are qualified to receive it. There is not now the same compelling reason. Many who have the ability to pursue advanced studies lack the means of doing so. This want is frequently met by private beneficence. It is also a fact that a community profits largely by the efforts of its higher intelligences. With these two facts in view, it seems evident that, when the primary educational needs are supplied, the question of supplying the secondary needs is one of State ability. If the circumstances of a community will permit its granting the higher educational facilities, they should be given only to those who shall have proved themselves fitted to profit by them. The moral, even more than the intellectual, tone of a people is a fit object of care. The common opinion in most communities as to the general truths of morality permits of their instruction without awakening opposition of opinion. But when to the force of moral obligation is to be superadded religious sentiment sustaining it, there is a probability of arousing opposing sentiments occasioned by the diversities of religious belief, naturally existing where opinion is free and private judgment is unrestrained. An objection somewhat similar to that alleged against the union of Church and State might here apply, though not to the same extent, and possibly might be obviated. In previous pages it has been pointed out that while within a community there may be various religious beliefs, these must not be at variance on vital moral and religious points; that to this family

of religions the State offers its support; that the State, to this extent alone, has a religious character. It is suggested, then, that the religious idea, as limited by this coincidence of belief, might in public instruction furnish the additional force which the moral sense alone is not sufficient to supply.

The liberty of speech and of writing is obviously a right. It is equally obvious that it is one which if unrestrained is liable to abuse. Especially is restraint upon this right necessary from the ease with which it may be made a weapon of abuse. It may offend against persons or against society. Offences against individuals are ordinarily fairly well guarded by the remedies provided against libel and slander. But the extension of the newspaper press has created a tendency to an invasion of private rights, against which the individual may justly demand protection. Offences against society may be directed amongst others toward existing institutions, social relations, or religious sentiments. The difficulty of applying restriction comes from the risk of suppressing honest expression and scientific investigation, from which progress and reform may be expected. If the element of malice is conspicuously present, if attack is made upon well-established institutions without justificatory reasons, repression is obviously a duty. Jurisprudence often finds a difficult task in applying just distinctions. An extreme difficulty is found in the treatment of utterances hostile to the form and methods of existing governments. With the progress of society offences of a certain character will diminish or disappear, and others of a milder form will exhibit themselves. The licence of speech and utterance of opinion to an unwise and even dangerous extent, is an evil of modern times. An autocratic type of government, owing to the low character of the people to whom alone it is applicable, may find it necessary to repress too critical expressions of opinion. A highly developed

system applied to a highly developed type of people, may find its safety in unrepressed utterances of belief. It is curious and instructive to note the gradually diminishing severity of the laws concerning treasonable utterances. The Constitution of The United States limits treason to overt acts. The right of petition for redress of grievance presupposes a somewhat public expression of grievance. The degree to which freedom of public speech may be permitted will be according to the fitness of the people to use it. A popular form of government may find a popular expression of opinion among an intelligent and law-abiding people of wholesome effect, both for enlightenment and production of harmony; but if the changes of time should introduce among such people a body of persons ignorant and inflammable, liable to be incited to hostile acts by unwise speech, the safety of the community would demand that the liberty of public speech be curtailed. It is a valued right if well used, a dangerous weapon if wielded by the ignorant or the vicious.

In this review of some of the principal rights which attach to human nature, they have been treated with a certain degree of particularity on account of their supreme importance, and in illustration of the manner in which they are derived, their necessary limitations, and the reasons for imposing their support upon the State. Many of them have been, when written Constitutions in whole or in part exist, directly asserted, imposing a duty or placing a check upon legislative actions. When the written Constitutional form is not found, their native force presents a silent admonition. Probably no authority exists so absolutely despotic as to be unaffected by the restraining influence of certain universally admitted rights. There are bounds beyond which the most nearly absolute ruler will not find it safe to advance. Public works subsidiary to rights less theoretical will be con-

sidered under the methods of State action. The conclusion of this part regards State action from the point of view of State duty.

In very long established States, when enlarged authority of the ruler has acquired the sanction of long custom, when the people have the habit of leaning upon authority for care and direction, progress of events may so modify their conditions as in particular cases to impose the question whether or not authority should be reduced, popular freedom enlarged. In more rare and recent Constitutions, where authority is much restricted and popular freedom is extensive, the new conditions, imposed perhaps by congestion of population, present the question of increase of rule, of reduction of popular freedom. The question of State duty, to do or not to do, is approached through opposite roads.

In the preceding pages the reasons why governments should be, their purpose, and the nature of human rights have been presented as they seem to deserve. From them may be found the means of meeting the above question. The burden of proof rests on authority to show its need and its fitness, according to the principles there set forth. These principles supply the test to which each case as it arises may be subjected. They furnish a rule at the same time rigid and elastic, rigid in the immutability of human rights, elastic in the varied means of their enforcement. But apart from the general principles determining State action, that action while still governed by a just purpose may be excessive, may be deficient, may err in methods. Admonition of error may be found in popular expression. Where individuals or associations are found doing a State work, for their own protection, or for the safety of society, there is an indication of a failure of State duty. Societies in aid of State charity, to compel enforcement of the laws for the prevention of evil, for protection of children and of the

lower animals, are, in part at least, an evidence of State inefficiency. The public protest against excessive taxation and abuse of official positions are signs of an opposite fault. The outcry of strikes, of financial crises, of socialism, even of anarchy, may be symptoms of wrongs for which State errors are responsible. Violence should be checked; but the protest should be heeded. These indications should be judged with discrimination. There may be an erroneous assumption that the conditions protested against are solely the products of a wrong political system or of its faulty administration. The faults of human nature itself should be taken into account. The signs of the times should be watched with careful judgment as indicating the trend and effect of political measures. The value of the historical test has been pointed out. The value of the ever-present test differs from it but in degree.

## PART II



## PART II

### INTRODUCTION

**N**EITHER science nor art acts alone to produce results. They are mutually assistant, and there is between them such an interdependence that the line of division is not distinctly marked. Generally speaking, science considers the principle of things, art the application of these principles. To utilise scientific principles, art is invoked; and on the other hand science is called to the aid of art to enlighten its action.

In the first part of this treatise a society has been presented whose reasons for being and whose aims have been set forth, with the principles on which it is founded. In this second part are to be considered the methods by which the purposes are to be accomplished, the instruments best adapted to this end, and the most effective modes of operation. Here is the application of art to the utilisation of scientific principles. But in this application of art, constant reference to science must be had to direct and govern its purpose. Societies with their directing governments have so long existed that one would expect to find abundant illustration of their forms and modes of operation. But history in this point is defective. Few historical treatises enlighten the study of the moral sciences. Elaborate and minute presentations of wars and turmoils, of the struggle of dynasties, of efforts for personal aggrandisement, are sufficiently abundant. From them it would seem that the one half of the world had been constantly engaged in the effort to

exterminate the other half, or to despoil its possessions. History may take a statistic or a scientific form, as its facts are either barely presented or are arrayed for scientific illustration. Some eminently scientific historical treatises are to be found; but in the main, students of societies and of government will not find many collations of facts to simplify their studies. A view of governments which have been reveals certain types with more or less distinctness of outline. Much instruction is to be obtained from a study of types, especially if found unmixed. If historical observation shows association between a type and its effects, by a composition of types as by a composition of forces certain distinct results may be attained.

Governments naturally may be classified according to the number respectively of their administrators. Monarchy signifies the rule of one with varied degrees of authority; Oligarchy and Aristocracy, that of a larger number to the exclusion of the masses; Democracy, the assumed rule of the many, more or less direct. These types have existed with sufficient distinctness to show their operation and effect upon the people. It is rarely, if ever, a present fact that any one of these forms can be found in absolute purity; nor is this desirable, for the very best governments are those which combine in varied but suitable proportions the advantages found in each of the different forms.

As to the study of these different systems a very pertinent question is the ancient *Cui bono*—Why consider the impracticable? Opportunities for the construction of a governmental system would seldom if ever occur; and if they should, they would offer too large a task for human ingenuity. But opportunities do occur for the modification of existing systems and for the adaptation of means to desired ends. A study of the nature and operation of existing systems will point out the true method of

adaptation, which otherwise would be left to chance or to the hazard of experiment.

This part, then, will consider the peculiar properties of the different governmental systems, with their advantages and their disadvantages; the natural division of functions and their methods; the means of adaptation to changing conditions; and finally, as a result, the combination of properties forming a governmental system suited to a highly developed community.

## CHAPTER I

### FORMS

THE purpose of this chapter is to consider governmental types and their special characteristics, with a view to learn the advantages and disadvantages appertaining to each. To do this effectively, the supposition must be made of each one existing free from mixture with other types,—a supposition merely, as the reality is rarely, if ever, to be found. In other words, we must dwell upon the attributes belonging to the simple forms alone.

Monarchy, or the rule of one, naturally first attracts attention. The notion of one supreme ruler, more or less absolute, is a rude and simple idea. Power and authority are the earliest conceived attributes of government. Monarchy and militarism are closely associated. It is easy to suppose that the first idea of monarchy must have arisen from the needs of defence or of aggression. The habits of discipline, of implicit obedience, and of reliance on individual skill—the essential qualities of militarism—are found in monarchy more completely than in any other governmental form. Accordingly, it is the one best fitted for the creation of nations, for extension of territory, and for national aggrandisement. Its prominent feature is force; its effect, the development of the State rather than of the individual. Monarchy, then, is favorable to compactness and power in the State, is hostile to personal liberty and advancement. Lest the example of States of the mixed form may be quoted in

opposition to this view, the warning before given must be heeded, that the monarchical attributes and effects alone are in question.

The early military monarchies depended on the personal qualities of the leader, and naturally lacked the permanence of character which belongs to the dynastic power. In elective monarchies there must be at the close of each reign a disruption of an existing order, a period of uncertainty, to be followed by a new order having its special characteristics, though more or less restricted by tradition or by system. But there is here impressed on the public mind the notion of change and the possibility of improvement, contrasted with the hopelessness of the settled form. The elective system, however, is left too much to the personal character of the monarch at the time being. It precludes the notion of Constitutional principles. Only when the succession is fixed after a certain method, and especially when the hereditary principle is introduced, is a permanent form established, with fixity of institutions and a larger degree of personal rights. The hereditary method of succession seems to have commended itself by the assured possession which it offers, and by the avoidance of turmoil and unsettled conditions. In this respect it is a distinct advance upon earlier methods. Its effect in consolidating and fixing the monarchical idea, is owing to various influences acting on the human mind. In itself, however, hereditary succession is a curious anomaly. To one educated in sound principles of government, which assume that the chief office in a State demands competency in its administrator, hereditary succession is an absurdity. That the qualities which insure a good administration of office should be directly transmitted is improbable to the highest degree. Heredity doubtless is a law. The causes which produce effects obey that law, but they are numerous, and the degree of weight which attaches to each is

indeterminable. The qualities derived by inheritance come from so many sources, and in such varied proportions, as to preclude a sufficient knowledge on which to base computation. That any quality, or any set of qualities, may be transmitted, there must be a freedom from composition with other qualities. The character of an individual is subject also to modification by various circumstances from time to time affecting it, so that transmissible qualities become changed or lost and the transmission is interrupted. It is evident, then, that we cannot look with any certainty to inheritance for desired properties.

But that which may not be ascertainable in individual cases may obtain in the aggregate. The degree of particularity essential in individual cases is not necessary in aggregates. Facts which vitiate conclusions in particular instances may have but slight influence in general cases. Modifying circumstances also may be taken into account, and their operation be computed. The character of a people may be observed, the action of various customs and habits be noted, and the transmissible properties of race be assumed with a large degree of accuracy. The methods of reasoning differ as applied to aggregates or to particulars. The hereditary principle, then, as a means of obtaining personal competency, is inadmissible in politics. But in politics the hereditary principle does not base its claim for recognition on such grounds. It serves in monarchy, besides giving the permanence afforded by regular succession, to impress on the public mind the idea of legitimacy—and legitimacy in this connection implies a great deal. There is something in the notion of inheritance as an innate right which appeals to the general sense of justice. The prescriptive right of long occupation also asserts its claim. If the term "legitimacy" were restricted in its import to a claim, sanctioned by an established order and by a fitness of

purpose, it would be unobjectionable. But in the numerous wars and disturbances occasioned by the clashing of opposing claims, the word has been extended to signify an actual property in the State and in a people, of the right of authority on the one hand, and the duty of obedience on the other. The belief expressed by the meaning of "legitimacy" is a complete misconception of the office of the governing body or of the administrator of public affairs in a State. Loyalty to a person is implied rather than loyalty to a people, and the public good is sacrificed to the supposed rights of one or of a few. This error is one of belief and of reasoning, the result of a continued line of thought and of education; but it is strongly reinforced by a peculiar sentiment, probably an outgrowth of this belief. There is a mixture of the ridiculous and the sublime in the veneration which attaches itself to the notion of royalty. The sublimity lies in the devotion and self-sacrifice which it has so often called forth; the ridiculous, in the insufficient foundation on which it rests, and the frequent contrast between the greatness of the devotion and the littleness of the object on which it is lavished.

Nevertheless, the stability of many monarchical systems, resisting attempts at destruction, resisting even attempts at reformation, is owing to this belief and this sentiment,—and the latter is not the least of the sustaining forces. Sentiment is a power against which scientific truth has constantly to contend. The conception of special divine creation or of divine countenance to any system grants it a title superior to any modern consideration of utility. The belief once admitted concedes authority to the utmost degree of absolutism. The most concentrated form of this belief is found in theocracies, where it implies that the civil Constitution is prescribed by divinity, or that the course of administration is constantly under divine direction. This would necessitate

an intercourse with the Supreme Being directly, or through the medium of a sacerdotal body. The supernatural is thus ever present, re-enforcing the civil power. A somewhat similar conception represents the ruling power, although of human creation, filling, in some obscure way, a sacred office. The reason of this belief, at one time very general, does not very clearly appear. It may be a survival, or a modification, of the theocratic idea. It may be an impression produced by long-continued authority. It may be the effect of association between the Church and the State.

In this association there would seem to be a mutual benefit. Though sometimes in antagonism, the power of mutual assistance is a bond of union between these two institutions. The Church has often needed the aid of the temporal power to secure its possessions, and to enforce its decrees. The State, whether seeking prophetic sanction, oracular approval, or the security derived from the injunction of non-resistance, invokes the assistance of the Church to sanctify its authority. But, however obtained, the impression of a divine derivation intensifies civil power, and tends to remove from those in authority the wholesome restraints of responsibility to those for whose benefit the office should be administered. Although the theocratic idea in completeness or in a modified form may be associated with various governmental systems, it affiliates most readily with the monarchical form, and but rarely with any other form. There is a kinship of methods between the two which renders their union an easy one. The pomp and circumstance of royalty are additional aids to creating an impress of legitimacy. The ordinary mind, much influenced by show, unable to distinguish between the real and the false, between the outward form and the substance, fails to recognise the right to existence based on adaptation to a distinct end.

If from the above-mentioned forces, which may go to support monarchical rule and give it an impress of right, we except the theocratic, because that presents at least a claim not only of creating a system but also of affording a continuing guidance, the others are extraneous forces, not going to the nature of the object, but, like scenic effects, giving imaginary, not real, character. They grant authority, but afford no guaranty of right government. Even the principle of divine right sanctions an existence, but supplies no wisdom in its direction. If the value of any system lies in its power to accomplish the purposes for which it is designed, and when, either in part or in whole, it is susceptible of change and adaptation as circumstances may from time to time render imperative, that system has a legitimate claim to be, and one which it must constantly sustain. It is based on a principle continuing when form or administration is altered. But when the foundation of a system rests on circumstances disassociated from the true objects of government, the forces sustaining it are illegitimate forces, and vest with equal authority a power for good or a power for evil. The forces before mentioned are of this character. They are the forces usually found sustaining monarchy, excepting when monarchy is in an attenuated form. From an irresponsible power certain evil tendencies are naturally to be expected, among them unequal administration of justice, favouritism as to individuals or classes, aggrandisement of dynasty, resistance to all progress tending to decrease of royal power, militarism, and wars of aggression and conquest. These tendencies are found to exist, probably proportionate to the degree in which the monarchy approaches to absolutism. Absolutism to an extreme degree is possible only where ignorance and superstition are found. Despotism in its absolute form is rarely if ever existent. There is always a restriction of custom, having the effect of Constitutional prohibition.

There is always a point beyond which it is dangerous to go. Limitations imposed by custom, by the genius of a people, by prescription, or by irrevocable compact, give a great variety in monarchies. Extreme limitation may combine the strength of the kingdom with the freedom of the republic.

From defects to turn to advantages, to the intrinsic merits of the monarchical form: The most conspicuous element of monarchy is force—strength in the executive power. If the system of laws under which the government is managed is just and right, assured power in its execution is desirable. This is a truth applicable in times of peace, still more so in times of war. Unfortunately war is one of the contingencies against which nations are required to prepare, and if its executive power is weak it is liable to suffer from external aggression or internal turbulence. An important quality in the executive department of a government is a force sufficient to maintain the laws at all times, to suppress insurrection, and to sustain the integrity of the State against foreign encroachment. Unity of the executive favors this necessary degree of power. Division of power implies its limitation. While this necessary quality usually resides in monarchy, it is too often in excess and thus is liable to abuse other rights. This lesson, then, it seems, is to be learnt from the observation of monarchical systems: that executive unity gives force, and that force to a just degree is essential to the proper maintenance of law and to the protection of the State; but also that the force should be restricted to its fair requirements. The limitation is best effected by giving to each governmental department the degree of self-sustaining power which properly belongs to it; and the method of attaining this result is dependent on the nature of the system adopted, and the peculiar character of the people to whom it is applied.

The etymology of "aristocracy" describes that signification of the word with which politics is directly concerned—the body in a State which rules, or which is possessed legally of privileges not appertaining to the citizens. The rule may be either the qualification for holding office, or the sole power of electing to office. The privilege may be the exemption from certain burdens, or the possession of exclusive rights. A less restricted and a less correct meaning implies only the distinction of classes found in all societies. The one meaning describes a constitutionally existing body; the other, one conforming to a varied and arbitrary standard. The prime ingredient in the composite term is superiority to all other bodies; but its correctness is often negatived by facts. In the first instance, the *best* is a class restricted to and measured by a fixed standard. In the second instance, the *best* is the class which chooses to adopt the prefix. There are many claimants to the distinction, but there is no supreme judge before whom the rival claims of title may be adjusted. The secondary and vague meaning of the term interests us only as illustrating the manner in which that described in the primary meaning may have arisen.

Social classes more or less distinctly defined must always be in obedience to a law of man's nature, the gregarious quality of which impels association. The basis of union will be a community of qualities, a similarity of feeling, of habits, or of pursuits. The classification may be based on degree of education, intellectual, moral, or æsthetic, or on the possession of a certain amount of wealth, permitting different modes of life. A graceful American writer has pictured a "procession of life" in which the various orders of men are marshalled according to the possession in common of a specific quality, though differing perhaps in innumerable other respects. The philosophy of this picturesque description

lies in marking the quality which forms a bond of union. It is this which gives vitality to any union, and which alone insures its permanence. That a specific class may continue to be, it must have the power to exclude all lacking the true requisite of membership, and to recruit its forces from time to time with those having the qualification which union demands. Ordinarily, if unrestricted, human society will regulate itself on these lines, and will effect a differentiation with greater or less accuracy. But the futility of an attempt to perpetuate classes by artificial methods must be obvious. The one most frequently adopted, and with a limited degree of success, is heredity. That topic has already been discussed, and from that discussion the conclusion adopted, that its laws are but imperfectly understood. It must further appear that they cannot be applied to humanity with an assurance of success. Human feelings, tastes, and affections will assert themselves in opposition to any scheme to perpetuate qualities by descent. Heredity affords no guaranty of possession, in descendants, of qualities which lie at the base of social aggregations.

Of the different social classes some will have their basis in qualities generally recognised as superior to those on which others are founded. To such the term "aristocracy," used in its secondary sense, is often applied, but it is frequently applied without just discrimination. The term, correctly used, would describe classes of men whose cohesion depends on qualities imposing general respect. Such classes must play a somewhat important part in social economy. The presence in a community of classes distinguished by superiority in qualities commanding respect should have a beneficial influence on that community, providing qualifications for the higher offices in a State, and serving as a conservator of mental, moral, and æsthetic tone, and a model on which others may form themselves. To effectuate this purpose, such

classes must contain within themselves the power to maintain the standard of excellence on which they are founded, and there must be within the people a habit of respect for those holding a higher tone, or the influence of its presence will be lost. It is a weakness of the ultra-democratic idea, that it fosters a spirit of detraction, a tendency to deny superior qualities, to move towards a lower rather than a higher level. This spirit may arise from jealousy or distrust, or a disposition to relatively raise the lower by a disparagement of the higher nature. But the cause is perhaps less frequently found in such meaner motives than in a confusion of ideas, a failure to distinguish between political equality and personal difference. The cardinal principle of equality of human rights, which should be at the base of every well-constituted State, recognises and sustains those general rights which are common to humanity, but does not ignore the personal divergences which nature itself creates. Rightly understood, social classes may exist side by side in a community, not antagonistic, but reciprocally supportant.

But social classes, as such, have no direct political significance. The bond of union is not sufficiently strong to effect an influence on the political state. Stronger ties may unite a body into a powerful organisation having an effect on the body politic. A mutuality of self-interest is a bond of this nature. Those engaged in the same occupation, in spite of the rivalry often existing, find a special interest within their own class uniting them to maintain the class interest against external opposition. The guilds of ancient times and the trades unions of modern times often have had a potent effect on societies, and on political conditions. The religious element may unify strong bodies and possess them with a force measured by the transcendent importance of the spirit affecting them. Classes of this nature often oppose each other, or oppose the whole community, in the effort to

acquire unjust force. The power for good or for evil may reside within these classes. Historical conditions have shown this fact. Such classes as above considered are extra-constitutional. They have not a recognised position in the State. Classes with which Political Science is directly concerned are such as are sustained by the State, and are in fact a part of its Constitutional system. They may possess the attributes of power, or of privilege, or of both. Power may exist without privilege, but privilege without power has but an uncertain tenure. Classes of this nature usually have a degree of superiority. Their position at least grants them a degree of supereminence. To such, then, the term "aristocracy" is a correct appellation.

The inferences which would naturally arise from the knowledge of human nature, and of the ordinary progress of nations, are sustained by recorded facts, showing that, from early times to the present day, in all communities, are to be found classes enjoying exclusive authority. Between the two attributes of right and authority it is important to observe a distinction. Authority may be vested in a class within a community in accordance with a well-devised governmental system, and yet be in no sense a derogation of general personal rights. On the contrary, the system containing this special feature may under special circumstances be the one best fitted to preserve their personal rights. But privilege to the extent of denying to a large portion of a community those rights which, as before noticed, grow directly from the human constitution, presents a different aspect. The one is a manifest injustice, the other a method of securing justice. As a fact, the distinction does not always clearly appear. Privilege grows into authority, or authority attracts privilege. They are often closely allied. The distinction should nevertheless be carefully observed, lest the just should suffer from its association with the unjust, or the

unjust should escape deserved censure from the same association. We may reasonably expect to find class privileges existing most conspicuously in the least developed social forms, or in those older communities which have long resisted progress. We may expect to find a gradual diminution of privilege exactly in proportion to the advance in the direction of sound political principle. We may look for its extinction only when such principles shall have asserted themselves. But privilege has strong vitality, and needs to be constantly combated. Some of the causes which formerly existed are still operating, re-enforced by new causes, the product of new conditions. How privileged classes arose, and how they are maintained deserves attention.

The root of privilege lies in human selfish propensities, not tempered by a sense of justice, but asserting themselves whenever opportunity offers. The opportunity is offered whenever a people or a lesser body of men, united by some strong bond, is able by virtue of superior physical or mental force to dominate those inferior in these respects. A conquering race holds the conquered in subjection though it may itself be incorporated within the conquered nation. A dominant religious class holds in subjection those below them by virtue of a system created by superior intelligence. Thus in ancient times the descendants of a conquering race formed a privileged class. Where caste holds sway the priest represents the religious element, the warrior the forceful element, of privilege. And these conditions remain until diminished or extinguished by advancing enlightenment. In European countries, from which modern improved political systems are derived, the two elements of warlike skill and religious organisation serve to create two privileged classes. The permanence of the nobility was owing to the feudal system, of which it was a product. The secondary meaning of the word "feudum," denoting land,

indicates the stability of a system based on territorial possession. Feudality, accompanied by the possession of land, vested not only territorial property, but also civil jurisdiction. In the contest which ensued between royalty and feudalism, monarchy became triumphant, a nation was created, and the scattered authority was concentrated in the national head. But the residuum is that on which the aristocratic order rests. A contrast has frequently been drawn between the nobility of France and that of England, and this contrast illustrates the manner in which this residue of power and privilege affects the continuance of the nobility. In England privilege constantly tended to diminish, and it finally ceased. The nobility remained as a part of the political system, performing a political office, but enjoying no special civil rights from which the rest of the people was excluded, and thus inspiring neither jealousy nor distrust. In France, on the contrary, privilege was carried to an incredible extent. The disease brought its own remedy. The final assertion of human rights swept away feudal privilege, and nobility ceased to be, except as a name and a sentiment. The same principle gradually removed clerical privileges. Nobility, as a class, cannot resist the encroachment of general improvement. The more able and the more cultured will demand a share. The demand of privilege is constantly asserting itself, even in communities thoroughly democratic. Not self-interest alone prompts the assertion, but the fact that to most minds there is something especially attractive in the notion of privilege belonging either to oneself alone, or to a class of which one is a member, and which is not shared by the larger part of the community. With these two notions constantly acting, the pride of exclusive possession and personal gain, it is not surprising that the spirit of just equality must always struggle against the desire of privilege.

One can hardly fail to notice that in all communities there seems to be a natural division of the people into three classes, usually termed the higher, the middle, and the lower. This distinction is not strictly social, inasmuch as each of these divisions will contain within itself classes which are properly called social. The nature of their class, their relation to one another, and the varied degree of strictness in the line of separating them, evidently have an important bearing on the condition of a people. This threefold division seems to be the product of numerous factors, such as the degree of intelligence or education, occupation, and material property. Those occupations whose nature demands a long training, a high degree of intelligence, and perhaps certain natural faculties, usually bring as a result a high degree of wealth, or a high degree of consideration. Those then who are engaged in such occupations, or who by means of wealth have leisure which should be used in beneficial though unremunerative labor, form the upper class. Those, on the contrary, whose employment requires but slight skill or capacity, and is consequently poorly paid, form the lower class in the community. Between these two grades there is a large interval occupied by what is termed the middle class. It may be assumed that the moral and material prosperity of a people may be measured by the relative proportions of these classes. The better attributes of the higher class—superior intelligence and trained skill—are not likely to prevail beyond the requirements of the conditions which demand them. But the limits to the increase of wealth are not so easily fixed. From this point of view the extreme classes move with equal steps. The conditions of society favourable to increase of the wealthy class favour also the increase of the lower class. There is a tendency to extremes, and the condition of extremes is not supposed to effect general prosperity. The middle class is the equipoise

between the two extremes. It possesses the bulk of moderate intelligence and skill. It furnishes a position to which those of the lower class may aspire. It supplies the recruits to the better element of the upper class. That state of society in which the extremes prevail is one of great brilliancy, perhaps of great achievements, and of a corresponding degradation. The state in which the proportion of the middle class to the extremes is great is presumably most favourable to the prosperity of a nation and to the general welfare of its people. It is not desirable, either, that the line between the different grades should be marked with too great distinction. A gradual shading is more to be wished. It is probable that the varied proportions of classes are owing to circumstances difficult to trace and impossible to control; yet it is also likely that human direction may have its influence in promoting these conditions. Fixity of class is not desirable. It is opposed to progress, though probably favourable to material welfare. The tendency of the present time is toward mere material prosperity. New industrial methods, creating great aggregates of wealth and a corresponding degree of poverty, produce an antagonism of classes much to be deplored. Governmental action tending to favour such conditions is unwise: such conditions are a severe strain on the democratic principle. So far, then, the observation of these facts and the conclusions drawn from them may be of some utility. It is a current doctrine that all observation and investigation is best conducted when thoroughness alone is had in mind without regard to ulterior purpose and effect. Yet if barren of result affecting the welfare of the human race, the pursuit is labour misspent. The utilitarian view justifies the labour, but is not essential to its progress. The just relation of these three essential classes may be readily disturbed by unwise State action; and wise action may produce or sustain the harmony of classes.

It remains to consider aristocracy in its primary and direct sense, as the ruling body in a State. It is government by a small body within the State. Oligarchy is also the government by the oligoi, the few. To this extent the terms coincide. But a distinction has been clearly drawn between the complete signification of the terms. Oligarchy has become almost a term of reproach, implying a possession of power by a small body who have acquired it by a certain degree of usurpation, and whose rule is more in the interest of that body than of the people. Aristocracy is also the government of a small body, but one supposedly composed of those having superior qualifications for the governing office. If this supposition could be realised and maintained, a governmental system approaching to perfection might be found. The members of such a body should have sufficient culture and intelligence to perform the duties imposed on them, and sufficient virtue to consider the interests of the people. Their numbers also might avert the tendency to aggrandisement, which is one of the dangers of monarchies. This theory has not generally been sustained by experience. We must look to ancient governments for examples of pure aristocracy, and in them we do not find the requisite stability and fitness for purpose. This is owing doubtless to the difficulty, already pointed out, of maintaining such an order in its integrity. Possessions and the heredity principle, the bulwarks of the order, cannot guarantee its purity. Its isolation in a progressive community, amidst constantly growing intelligence and culture, makes it a political solecism in modern communities. Aristocracy, then, as a governmental system, is unfitted to present conditions. But as a component part of a general system, it may occupy a useful place. Aristocracy has thus in the past performed a beneficent part in opposing monarchical encroachment. It has also obstructed real progress. In a

modified form the aristocratic principle, its virtues retained and its faults avoided, may possibly form a valued part of a well-constituted governmental system.

In the consideration of the three principal governmental systems there is, of necessity, a degree of indefiniteness in the terms designating them. Singleness of authority implied in the term "monarchy" may embrace absolutism or extreme limitation. "Aristocracy" may suggest authority vested in a few without defining how that few is constituted. "Democracy" may be a government by the people, and yet the degree and manner in which the people perform their part be indeterminate. A negative description of democracy would perhaps be sufficiently accurate, defining it as that which the other two forms are not, where neither one person nor a small portion of a community is endowed with the right of taking part in governmental functions. A misconception of the meaning and intent of democracy is sometimes found to exist, an error of vital importance when held by those who are able to shape and direct democratic communities, the notion that there inheres to every citizen of a State, by virtue of his very existence, the right of selecting at least those who are to administer governmental affairs. This notion is rarely carried to its complete logical conclusion; nevertheless its influence may be injuriously exerted. If the views expressed in a former part of this work respecting the objects of government have been fairly and correctly stated, they should serve to correct this misconception. The direct action of the individuals in any community of a considerable size is necessarily impracticable. It must be limited to the selection of certain persons thought to be qualified for the performance of governmental functions. It is an ideal picture and an attractive one, of all the members of a society selecting some among them to whom the interests of all can with perfect faith be intrusted; but it is within reason to be-

lieve that this faith may be misplaced and the desired result fail of attainment. In the analysis of human rights before exhibited, the performance of governmental function cannot directly or inferentially be found. The right of suffrage is not a general right, but simply a means to an end, a part of a system designed to accomplish certain results. It has been the purpose of this work to set forth the object of all governments, and to regard each one only as an instrument for attaining that object. The different forms have been considered, and among them the democratic form, as the one in which the people perform a larger share of public duty than in any other form. But its purpose must not be lost to sight. A false sentiment, a misconception of human rights, may vitiate a system and make it fail of purpose. Unrestricted suffrage is neither an absolute human right, nor an essential element of democracy. The extent to which suffrage is granted must depend on the qualities of the people to whom the system in question is applied, —the capacity for performing this one function, and the will to use it aright. If people are to be ruled by themselves, they must be ruled by their own intelligence and virtue, not by their ignorance and vice. It is undoubtedly desirable that this privilege should be extended as far as the circumstances of each case will permit, as from this feature of democracy much of public security and personal development is to be expected. That these benefits may be secured, the function should be restricted within the limits of safety. It is probable that an undue extension of this principle is the source from which the greatest risk is to be apprehended. If carried to the extent of error, the error is one almost impossible to retrieve. Not so large a demand has been made for the right of holding office. Even where the idea of fitness has not entered into the question of suffrage, it has been thought to apply to some extent to official duties, and restrictions

of some sort have usually been applied. Yet if the essential and necessary idea of fitness governs, restrictions seem needless, unless having some extraneous purpose.

Democracy may be regarded as a principle, or as a system. As a principle, it conforms to the ideas which have been set forth as to the office of government to secure human rights—rights appertaining to human beings as human beings. As a system, it is a method of securing such rights. It is easy to conceive that the democratic principle and the democratic system may at times be in conflict. The system must wait upon the principle, must be adapted to sustain and not to destroy it. "Democracy," like "aristocracy," has a primary meaning and a secondary meaning: etymologically, the rule of the people; and, secondarily and adjectively, that which appertains to the people. If in this secondary sense the term may be applied to the general principle of human rights, that principle has been abundantly considered in the first part of this work. The present part concerns democracy as a system, as a means to an end, with its merits and demerits, and the contrast which it presents to the other systems before considered. The chief merit one might expect to find in the democratic system is the avoidance of the errors elsewhere found, viz., favouritism of class, and a disregard of the interests of the people in general. It is expected that among the changes which are constantly in progress among all peoples, the varying interests of the people may be always present to those charged with the administration of affairs. The constant sympathy between the rulers and the ruled are ever-present recognitions of the claims of the people and of a disposition to enforce their rights. Its effect also upon the character of a people is to develop self-reliance, habits of self-control, and of obedience to the law—obedience not so much the product of force, but of respect for authority rightly constituted. But it serves to develop

such qualities, not to create them. Every people to whom the democratic system is to be applied needs to be already possessed to some degree of these qualities. The necessary participation of the people in some of the governmental functions demands certain requisites of fitness for the duties imposed on them. Herein perhaps is to be found the test of capacity for a reception of this system.

It is necessary to consider some of the defects incident to democracy. There is a liability to an injudicious selection of representatives. The causes of this have been heretofore adverted to. Springing from the same cause is the liability to be led and misled by persons making politics a business in its lowest sense. Such persons by their close relation to the people often have a special faculty for influencing their feelings and their judgment. The strong force of party organization acts in the same direction. There are to be found also an undue magnifying of unimportant matters, to the exclusion of the more important, a lack of stability in governmental methods and policies, and a constant demand for temporary measures. There likewise appears a want of force and a fickleness of purpose, owing to the need of popular endorsement of governmental actions.

[It will be observed that the term "Democracy" has been used to distinguish the third type of government, in obedience to the custom heretofore existing whenever those types have been compared. But the justness of the appellation may be questioned, there having grown up and at present existing an association between the word and the extreme type of democracy, affixing to a system a reproach which only belongs to its abuse. The word "Republic" seems to describe sufficiently well the more popular type of government, and to accord with such limitations or modification of the system as conditions may require. In number 39 of *The Federalist* Mr.

Madison notes the distinctive character of the republican form and describes a republic to be "government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their office during pleasure, for a limited period, or during good behaviour." He states it to be "*essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favoured class of it," and to be "*sufficient* for such a government, that the persons administering it be appointed either directly or indirectly by the people." This definition by one of the founders of a great modern Republic may be considered conclusive. It describes a form of popular government in which much latitude of construction is permitted. It differs from the general impression as to the meaning of democracy. The influence of a name in effecting impressions, either favourable or unfavourable, prescribes caution in its use.]

The virtues and the vices, the merits and the defects of these different systems have been presented as they are believed to be. It also would seem that the defects increase as the extremes of each system are approached. Monarchy becomes objectionable as it reaches absolutism. Democracy loses virtue with an excess of popular action.

That either form of government can exist, in modern times, in its absolute form, is not to be expected. As civilisation advances, and Political Science makes progress, the distinctive types must become less marked, and will only have sufficient prominence to give a name to the system. There will undoubtedly be a tendency towards liberalism and a larger degree of the popular element, and an advance in this direction must depend on the conditions which in each case may favour this advance. Modern governments have somewhat of a composite character, and it is believed that some of the

features of the different types above considered may be applied with profit to the different departments into which governments naturally divide themselves. With this view it becomes necessary to study their different departments, to note their special characteristics, and to ascertain their respective needs.

## CHAPTER II

### ESSENTIAL DEPARTMENTS

HERE is a natural division of governmental functions. The legislative, executive, and judicial departments have each distinct characteristics, independent of the system under which they are administered. Whether the three departments are operated by the same body, or whether, according to a carefully devised plan, there is a certain association in the management of these departments, each has its special features and special method of operation. There is an obvious advantage in the ability to study a subject in its separate parts. This facilitates investigation by its freedom from complications. These departments, then, may be separately considered. Their connection appears in methods of administration.

The basal department is the Legislative. It is that which sets in motion the governmental machine, which gives it impetus, and regulates its action. The executive enforces legislative decrees. The judiciary determines the method of their application, and in some instances determines the validity of the decrees themselves. These distinctive features are irrespective of a division of duties between the departments. In the most absolute form, when all rule and direction emanated from one person, there would be the same differentiation of functions. It is often a question whether or not these departments should be separate and distinct in management. This question has been discussed in *The Federalist* in its justi-

fication of the plan adopted in the Constitution of The United States, where they are not kept entirely separate. The arguments there employed seem to have been sanctioned by experience, and no evil has resulted from an association of departments to the extent then adopted. Another often mooted question is: From which department is the greater risk to be apprehended,—which is the most likely to usurp functions beyond its province? And this seems to invite the question of the independence of departments. The risk of executive usurpation is probably the one with which most countries are familiar. The progress of political ideas has been mostly from a certain degree of absolutism towards popular principles, a continuous contest against executive arrogance. "Liberty," so often panegyrised, meant freedom from governmental tyranny, the one most familiar. The "Goddess of Reason" of the period of the French Revolution was a protest against ecclesiastic tyranny, a form almost equally familiar. Historically, people are familiar with the progress above mentioned, look to it for improvement, and may thus fail to see at what point this movement should cease. It is conceivable that, starting from the opposite point, a movement in a different direction might be in the interest of good government. A legislative body is quite capable of imperilling the safety and good order of a State from lack of skill, from corruption, from arrogance of power. This is recognised in Constitutional restrictions and checks upon legislative action, as by the veto power, by dissolution of the legislative body, by judicial supervision. From extreme democracy, where the legislative department forms the most prominent feature, to absolutism, the transition has more than once been accomplished in one step, guided by the irrational tendency toward extremes, which is a marked feature of human nature, and by the general impression that the errors of a system are best avoided by a resort to one having

directly opposite characteristics. [In *The Federalist* are found illustrations of the dangers to be apprehended from the legislature: "Its constitutional powers being at once more extensive and less susceptible of precise limits, it can, with the greater facility, mark under complicated and indirect measures the encroachments which it makes in the co-ordinate departments." "The tendency of Republican governments is to an aggrandisement of the legislative at the expense of the other departments." "You must first enable the government to control the governed, and in the next place oblige it to control itself." These remarks enforce the need of certain Constitutional checks against abuse of power in the departments.]

The comprehension of legislative action appears in a review of the subjects which come naturally within its direction. The whole body of jurisprudence regulating the relation of citizens toward one another and toward the State, for the purpose of securing established human rights, the protection of the health and the morals of the community, financial and commercial regulations, and the just distribution of the burdens of taxation, serve to show the all-embracing nature of legislative functions. To secure a fit instrument for such a purpose, with such a diversity of duties, is not a simple matter. The attributes of a legislator, measured by the importance of his duties, are varied.

The office demands a knowledge of the principles of government and of the rights which government is designed to guard, of all the principles which it thus far has been the object of this work to set forth, and of the best method of adjusting means to accomplish the desired ends. This last subject necessitates a knowledge of the people, their temper, and their customs. There must be a sympathy between the people and the legislator. It would seem by this general statement that far more both

of skill and experience is demanded than few, if any, could furnish. But it must be remembered that the legislator is not called upon to apply at once all the principles above referred to, though they lie at the foundation of all sound governmental action. His duty is mainly to adapt or to modify according to the exigencies of each case as they arise. The creative talent is seldom required. Governmental systems are of gradual growth, developed by circumstances, by the impulse of the times and of the people. The successful instances of new creations have had in existence a basis on which to construct. The founders of The United States Constitution did not neglect the experience of other people. Immediate experience was found in the colonial governments, operating in the very conditions to which the new one was to be applied. The dozen of years under the confederation had taught what was to be avoided, and what was to be corrected. It is no disparagement of knowledge and skill that a clue was at hand and a guide to the right direction was found. The first French Republic, in which may be descried a series of trials at governmental system, was built upon the ruins of a monarchy. The old order had been condemned, and there was no easy transition from the old to the new. The task of construction was too great for untrained skill, and the structure fell in the reaction to the older though modified form. The office of the legislator, then, demands qualifications of a high order; and that plan is the most satisfactory which insures the office being filled according to its requirements. It will be examined how far the three systems of government treated of in the last chapter are adapted to each of these departments in turn.

Monarchy is not ever entirely absolute. It is bound by certain conventions and certain usages having the force of law, which, though technically subject to repeal

by the will of the monarch, are in fact inviolable. Necessity also requires certain methods of administration with officers or bodies of men to whom these affairs are respectively intrusted. A legislative body must also be. But when there is the universal referendum to the one head of authority possessing the absolute veto and the power of appointment and dismissal, legislative action is inspired and controlled by the one supreme head of authority. Excepting as to the very general restrictions above alluded to, the supremacy of the one is admitted.

There is probably no better settled principle than that legislation should be the result of discussion, comparison of views, and a general knowledge of its particular needs. It might happen that a single legislator of superior judgment, honesty of purpose, and unselfish desire for the public welfare, aided by well-selected councillors, might produce excellent results. Yet this implies conditions highly improbable. The lack of individual wisdom may be corrected by the collective wisdom of a large body, each one of which may contribute to the enlightenment of the whole body: what is wanting in the individual may be obtained in the aggregate. The principle of monarchy is not favourable to such legislative action as is best for the interest of the people on whom it acts. Both aristocracy and democracy supply that in legislative needs in which monarchy is deficient. In each, however, there is the liability to certain defects and errors. Aristocracy should contribute wisdom to its legislative body; but there is also the risk of overlooking the general welfare and regarding the interest of a class. Democracy, on the other hand, coming direct from the people, familiar with their character and their needs, may fail to furnish in legislative action the enlightenment, the judgment, and the skill necessary to make that action effective. Both of these two forms, in spite of their indirect defects,

supply, each in a measure, the qualities on which legislation depends.

The Executive department next demands attention. It is administrative, subordinate to the law and Constitutional provisions, and to judicial determinations. It is, so to speak, the business manager of national affairs, subject to the existing system, which may, however, be modified by the legitimate authority. To the citizen, he who occupies the seat of executive authority represents the law with the power of enforcement. To other nationalities he represents the State as her accredited agent. In both of these attitudes the position is one of dignity. It is not so wonderful, then, that in times less enlightened than the present in political wisdom, the person received the distinction which belonged to the State, and homage was paid to the man, not to the representative. The form remains when the substance is nearly lost, and in royal governments it is to "His Majesty" that service and obedience is nominally due. It has taken many years for people to learn that the ruler merely represents the State, holding his office by a prescribed tenure, and performing only the functions which the office demands. The duties may be stated in general terms, embracing the enforcement of the laws, the fulfilling of the ministerial functions of each executive department according to the spirit and purpose for which it was created, and upholding the rights and obligations of the State in reference to other States. The line of separation between executive and legislative duties is in the main sufficiently well marked, and efficiency in each is best attained by their separation. It is, however, consonant with the spirit of some governmental systems that in certain respects the two departments should be associated. That the efficiency of each department should not be impaired, the association should not be equal, but that department whose province is invaded by the other

should occupy the chief place and the other be merely subsidiary and assistant. With equal power in any one office there would be a confusion of functions and a clashing of duties.

The attributes which belong to this ministerial office are, besides honesty of purpose and the requisite skill, energy of character and force of will, tempered by a proper sense of the limitation of authority within the province of the office.

It seems to be conceded by all statesmen and students of Political Science that unity is an essential feature of executive office, that plurality divides responsibility, conceals faults, promotes vacillation in policy, and prevents vigor in action. A just conception of duty, a definite policy founded on it, and a firm execution of such policy form a just type of executive character. This can be made possible and be sustained by Constitutional endowment with the requisite authority over subordinates, with the necessary independence by provision of support and competent powers, and with duration of office sufficient to complete a policy. Every well-constituted government reveals in its list of the different bureaus the character of executive functions. It shows also a somewhat complicated system in the conduct of affairs. Yet this apparent complication may be reduced to a practical simplicity by degrees of subordination and of direct responsibility, both to the community as to general conduct and to the immediate director as to official conduct. The ultimate responsibility to the executive in chief, who in turn is responsible to the State for the right performance of all executive duties, implies a certain degree of control of all subordinate officials extending to the power of appointment and of removal. Without such power it is difficult to understand how the affairs of office can be conducted with the requisite energy and discipline. Certain checks and safeguards are admitted to be neces-

sary or wise. Apart from these the greatest safety in official conduct and the best security against either legislative or executive usurpation, may be found in a rigid definition of the duties of each department and a due responsibility to the nation for official conduct.

Of the different forms of government, the monarchical form provides the most efficient executive action, as the democratic furnishes the least. The tendencies of these opposing forms are towards a strong centralising force on the one hand, and on the other towards less vigor but larger popular freedom. Each needs restraint against undue extension, but in opposite directions. Republics are ill prepared for war. Their methods are those of peace, and in emergencies there is an enforced modification of the system and a change of methods, imposing a strain upon the body politic and a certain degree of risk in the return to normal conditions. Monarchy, on the other hand, is aggressive. Its compact form and discipline fit it for attack or defence. The attributes which give it this executive force are unity and stability. The one is attained by the existence of one responsible executive chief, the other by the establishment of permanent methods of executive office independent of a change of incumbent.

In this study of forms as known, and of the different departments, there is the attempt, in a measure, to associate the two, to establish a certain connection between the requisites of each department and the corresponding qualities in the different forms. To accomplish desired results, the qualities known to be fitted to promote them are to be applied to the extent only which is found to be requisite. The commendation of the qualities appertaining to specific forms does not extend to those forms in their entirety. Nor is it believed that such would be fitted to modern requirements. The manner of the application of special attributes to special departments is

reserved for the study of that particular type of government which is fitted to modern needs and advanced stages of civilisation.

It often happens that particular instances in practice seem to contradict announced principles. But it may be that these contradictions are more seeming than real. Anomalies often exist. The British Government seems to be one. A Constitution, so called, whose terms impose an obligation or a restraint upon a body which has full power to modify or to abrogate them and which in many cases has created them, a divided executive, and a legislature supreme and able to override the executive, accomplish nevertheless beneficent results, to be expected only from different conditions. The explanation is to be found in the temper of the people, the history and gradual growth of the political system, and chiefly perhaps from the fact that the practice is at variance with the principle, that certain rules are acknowledged in fact which have no binding Constitutional force. Their history presents instances of the establishment of certain important political principles, the result sometimes of years of struggle, becoming incorporated with the system, and acquiring a stability superior to ordinary legislation. The executive body recognizes the authority of its leader, and acts as a unit. The legislature as well as the people show a loyalty to the ruler and a disposition to sustain governmental executive measures. The disposition of the people is eminently conservative, sustaining, and averse to change. If, then, certain principles, though not announced, are recognised in practice, the instance sustains the truth and force. It is nevertheless important that truth and force should be distinctly recognised and asserted in the Constitution of a government, and carefully impressed on the minds of the people. The example of England, imitated elsewhere, may be at variance with the character of a people, and may fail for

want of those Constitutional provisions which its prototype has been able to dispense with. Again, if by some means, and in progress of time, the character of the English people should change, the special quality on which safety is in large measure based, would be wanting.

In The United States the democratic spirit has in some respects been carried to a dangerous extreme. There is always a latitude of action by which the spirit and intent of Constitutional provisions may be in a measure perverted. But the evil effects of such perversion have been avoided by a strong disposition towards obedience to law in the abstract and of regard for the Constitution. The war of Secession does not negative the existence nor the universality of those sentiments. The wild ambitions of men, or a mistaken sense of self-interest, lead to strange perversions of thought and conduct. The ordinary habits of thought and feeling of a people may be disturbed by some strong impelling influence of greater or less duration, without effecting a lasting change in the character of the people. But the spirit of a people may be greatly modified by the admixture of a foreign element sufficiently strong to overcome the native habits and feelings, and this corrective influence then be lost.

Instances are to be found in South and Central America of republics possessing Constitutions well suited to effect stability of government, yet subject to constant turmoil, and to what is not to be expected in a democratic system, executive usurpation, and showing a tendency to return to a system more conformable to the character of the people.

These various examples do not deny the validity and effectiveness of a proper adjustment of functions in the different governmental departments, but they do show that it may exist in effect without formal expression, and that undue extension of a principle is sometimes robbed of its evil effects by the contrary influence of

national character. The last instances are of a system ill adapted to the people.

The Judicial department differs from the others in having less of a strictly political character. It is not creative nor administrative. It has been described as having neither force nor will but merely judgment, as the weakest of the three departments of power, and one from which no aggressive action is to be feared. The application of the term "the weakest" may need explanation. Weakness refers to the slight part it performs in direct governmental action. But its strength lies in its being the ultimate arbiter and judge, and the protector of human rights. It has also truthfully been said that an upright and independent judiciary is the chief protection against oppression by the rulers. That the judiciary may be qualified for this high office, it must be endowed with the qualities fitting it for its duties. To a limited degree the judiciary takes a direct part in political action. It interprets a legislative act and applies it in individual cases. But ordinarily it acts upon the particular system of jurisprudence which the State has adopted. Jurisprudence is not a direct creation of the legislative power. It is a matter of slow growth. Even where a specific code of laws has been adopted, it is usually a compilation of laws which have been gradually adopted and which time and circumstance have fitted to the needs and character of the people. Every system of laws is in its application modified or moulded by judicial interpretation, and in this sense the judiciary performs a creative or a directive office. The Common Law is conspicuously an evidence of judicial influence in developing, and even in creating, a system of laws. The holders of judicial offices are in their ordinary duties performing a scientific work, and are selected with a view to fitness for such a work. The department thus, although a part of a governmental system, is usually of little direct political action.

It is not easy to determine which of these governmental systems is best fitted to secure an efficient judiciary. The office, besides the qualifications of professional competency, demands freedom of action. This necessary independence may be assured in the manner of appointment, in the tenure of office, and in security of compensation. The power of appointing to judicial office requires the ability to judge of the qualifications of the appointee, and that it shall be limited to appointment alone, without the right of removal, and without control of the salary appurtenant to the office. Monarchical method, while securing the requisite ability by its direct control over all appointees, fails to assure that independence which is essential to the proper fulfilment of judicial duties. Democracy errs in the same direction by too great a limitation of the term of office, too great subservience to the popular will, and more especially by the probability of a lack of qualification in those appointed to office, owing to injudicious modes of appointment. Aristocracy should assure proper qualification for office, and whatever of defects might exist would be such as are incidental to the aristocratic system in general.

The unique position of the Judiciary department under The United States Constitution illustrates the political office which it may perform and the relative bearings of the different departments. Legislative limitation is interpreted by the judiciary as the cases arise. If a legislative act is determined to be repugnant to Constitutional provisions, it is declared invalid, and the corrective is applied by the executive and through the judicial department. And these two serve as a Constitutional check upon the legislature. By the same means the judiciary performs its part in legislative action, inasmuch as every act is subject to judicial scrutiny and tacitly or actually receives its sanction or condemnation.

A review thus far has been had of the different forms

of government as historically exhibited, and of the different departments into which governments naturally are divided; and the attempt has been made to show what excellences or what faults reside in each form specially, and that there may be some special excellence in one or another of these forms as applied to the different departments. It must be obvious that in its extreme form neither type of government is adapted to the requirements of modern civilisation, that each existing form must be modified in obedience to the spirit of political purposes. Thus the different forms tend to approach one another, to reach a degree of assimilation, at the same time retaining to a degree each of its specific characteristics. The modern government is composite. To effect a great composition, the excellences of the older forms should be applied to the governmental departments as they seem fitting. The practical methods of this adaptation must be reserved for the consideration of that general type of government towards which advancing conditions are tending.

## CHAPTER III

### STATE FUNCTIONS AND THEIR METHODS

THE question here presents itself whether it is possible to set forth with any accuracy the proper functions of a State and the proper methods of administering them. That it is impossible to define them by a rigid rule goes without saying; for the methods of each State for accomplishing good government, and for attaining what we are willing to admit to be good results, must vary as the conditions vary under which the attempt is made. Still, a similarity of purpose and a uniformity of man's nature in advanced stages of civilisation effect a certain degree of uniformity in governmental forms. We can deal best with government as a type to which all should endeavour to conform, essential divergencies being yet consistent with the type. Human rights have been considered, and the general purpose of a State. A common purpose produces a certain uniformity of method to attain it. We may then consider the extent and quality of State functions in general with reference to the principles heretofore stated, basing their justness and fitness upon their conformity with such principles. A mere statement of the duties of a State in the interest of its citizens needs to be supplemented by a more direct and practical application of the methods of attaining the desired results without the established lines of State duty. The functions of government are numerous and varied: to consider them intelligently classification is needed, and classification is sufficiently

well supplied by the distinctive characteristics of the various duties.

Governmental functions may be divided into groups or sections, according to the specific nature of the object they are designed to effect. The first division of functions includes those to which the attribute of sovereignty most directly applies. The nature and extent of that term will be presently considered. This division comprises: first, the right of property which may vest in the State, the right being contained within the true sphere of State action; secondly, the position which the State must occupy in relation to all other States and all other peoples, thus bringing the State and its people within the domain of international law; thirdly, the force by which State power within strictly Constitutional principles may be maintained, and by which its just decrees may be enforced; fourthly, the power of support by exacting the necessary pecuniary provision for maintenance of the system. The second division is limited to the unquestionable office of fixing and distinguishing the rights of citizens among themselves, of establishing a system of jurisprudence, of administering the system, and of constituting the law and causing it to be respected. The third division relates to the care which it is within the province of the State to take of the physical, intellectual, and moral welfare of the citizen, bearing upon the individual directly as the individual welfare contributes to that of the community. The moral and civic virtues are promoted by education; the physical comforts, by systems of sanitation and by charitable institutions; and the religious element receives just protection within certain limitations. The fourth division deals with what concerns the material prosperity of man, the needs of sustenance, and progress in comfort and wellbeing. Sound systems of finance, facilities for commerce and transportation and for industrial occupations,

and the efficiency of State employees, are instances of the functions included within this division.

Many of the offices and duties of the State, though properly considered here, are within the domain of the other departments of Political Science. The relations of a community to all other communities are governed by the rules of international law. The civil and criminal systems of law are the product of a comprehensive study of jurisprudence in general. The regulation of industries and commerce, and of the monetary system is under the guidance of political economy. While the study of each department of the science respectively furnishes the best guide to the proper performance of the functions coming within its province, the department of State or Government unites the consideration of all their functions to the extent to which they in fact or in method are within the true and just province of State duty.

That division will be first treated of, which is effected by the quality of sovereignty, in opposition to individual right and individual action. Sovereignty is the abstract expression of the idea of the State. In these pages the terms "State" and "Government" have been used concurrently. If any distinctive shades of meaning have appeared, they show themselves only as expressions of relative action or of abstract thought. Elsewhere, however, may be found a marked difference proclaimed between the intention of these two terms. The term "State" then seems to be considered the more comprehensive and to imply that there is something back of the government and of its prior existence. It is possible that the State may be regarded as an incorporeal something representing the aggregate of human right, and that the government is simply the method adopted for carrying out the purpose of the State's existence. A distinction such as this seems to define the ends of government and to correct the ancient misapprehension that a government

is only for the advantage of its administrators, or of special classes, instead of representing the interests of all within its political comprehension. In previous pages the real purposes of government have been abundantly set forth, and though there may have been a tacit distinction between the State as a passive idea and government as an active force, such distinction has not been emphasised,—and for this reason: The supreme government is the representative of the State in whatever manner constituted or originally created. The State apart from government cannot exist. A mere aggregation of individuals has no coherence without the binding force of government. This it is which unites a people under the rule of law and constitutes a State. In Constitutional governments there does seem to be something superior to the government determining its form and limiting its authority. Yet this is simply a question of origin. Not until the binding force of government is applied does a particular State arise, though it may be the successor to some pre-existing State and have been created out of it. The aboriginal State lies far back in history. The Constitutional limitations on government are a part of its system, containing within itself methodical restrictions against abuse. Changes in the Constitution itself are effected through the government, not ordinarily in the usual legislative methods, but the initiative action proceeds from a constituted authority. It is almost impossible to conceive of a Constitutional body whose sole office should be the revision and amendment of an existing system. Yet it is evident that any action changing or abrogating a Constitution not proceeding from constituted authority would be revolutionary, would be a disintegration of the State itself. This is a consummation not to be wished except in extreme cases. Apart, then, from the most abstract conception, as every act of the State is through its government, there is a coincidence

in act, a practical equality in terms. Modern thinkers may seek to escape from too close an association between the ruling power and the body politic. They like to think that there is a power behind the throne, controlling it in the interest of the people. There are reasons for this desire, in the long continued abuse of governmental authority which history records, in the memory of a time when a monarch could announce that he was the State. Yet the remedy for that condition is not to be sought in metaphysical distinctions. If Political Science is to be of any avail in the progress of mankind, it will advocate that system which, within the lines of Constitutional authority, contains the security of human rights and proper adaptation to new conditions.

Sovereignty also is a word to which many shades of meaning have been attached, some of them fostering strange illusions and false conceptions of duty. Sovereignty in general indicates a quality which is essential in every form of government, the most arbitrary or the most popular, the most tyrannical or the most beneficent. It typifies the authority which must reside in the State, not only as enforcing obedience, but also as protecting the interests of the whole community. Its meaning is superiority over all things, and this is true as to ultimate superiority, but orders of sovereignty may exist within the State. In The United States, for instance, the Federal State is sovereign as to the minor States whenever their jurisdiction conflicts. A latent sovereignty also is founded, not displacing that of the minor State until its active force is asserted. The system determines when and where sovereignty is to be found. It may vest a dependent sovereignty in the lower departments of the government.

There is a class of functions which proceeds directly from State sovereignty in its aspect of guardian of popular interests in contradistinction to individual interests—

the appropriation or possession of property. In its larger sphere it mainly concerns property in land. Transfer of territory from one State to another as the result of conquest or purchase is a transfer of jurisdiction. The possession of property, with the exception of public property, remains as before the cession, subject or not, as the case may be, to a different system of jurisprudence. Not jurisdictional but actual property rights are here to be considered, with the mode of acquisition and the tenure by which held. For it is evident that the State may have possessory rights to property within its own territory, or even in a foreign territory. The possession of property and its use for distinctly defined purposes form one of the functions of the State. A large proportion of land held by the State is merely incidental to the due performance of certain other functions, and if these are legitimate, property necessary to their due performance is likewise legitimate. The direct uses of property are not so numerous. The maintenance of parks for hygienic purposes and to cultivate the æsthetic nature of a people are instances of direct use for the direct benefit of the community. Public works of various kinds, whether done by the State directly or by private hands are another instance of the use of property, to be hereafter considered when the mode of acquisition is treated. The holding of property by the State for the purpose of revenue does not accord with the best modern theories. Crown lands have been held, and still are held, as a revenue-bearing property for the personal support of a Sovereign. But such usage is not economically wise: the revenue may be fluctuating and uncertain, and it creates in a monarch a degree of independence unsuited to the duties of a ruler. But the ancient idea of a personal ruler confused the man and the monarch. Property and prerogatives were partly for governmental uses and partly for personal uses and enjoyment, and the extraordinary

methods of revenue from markets and wrecks, mines and licences, and various monopolies have in them a strong personal element. The modern idea is that the ruler or chief magistrate, like inferior officers, should receive a direct support from a fixed salary. The Constitution of The United States has granted sufficient independence to the Chief Magistrate by providing that his compensation shall not be diminished during his term of office, and has guarded against abuse by prohibiting its increase. It is curious to note the historical changes in ideas respecting the position of a ruler, the gradual disappearance of personal aggrandisement and privilege, and the approach to a better conception of the right and duty of a ruler. Viewed from our present position, the progress seems marvellously slow and the tenacity of ancient customs and prejudices remarkable. But gradual progress is more consonant with stability than abrupt disturbance of existing things with the uncertainty of reconstruction. Conservatism, while it may delay progress, makes progress more secure. In the political and Constitutional history of past times the constant aim has been to guard the people, not against the encroachment of the State as a power, as a government, but against the sovereign in his efforts for personal privilege.

According to the jurisprudence of some countries, crimes receive the additional punishment of forfeiture of goods and lands of the offender. Blackstone, desiring always to give a reason for things, has discovered the reason for this kind of punishment in the fact that society has granted to each of its members, in return for the natural liberty relinquished, certain rights to property, and that by his crime against the rules of society he has forfeited such special rights. He adds that the violence to natural affection which induces one to desire to provide for his offspring serves as a deterrent of crime, and that in this particular respect the laws of many other

States are more severe than the common law of England. All codes and systems of law are effected by the moral and social tone of the community that enacts them. The justificatory reasons hardly appeal to our present sense of right. An enlightened punitive system does not designedly punish the innocent for the faults of the guilty, nor inflict an injury on the kindly emotions of our nature as a form of punishment. Forfeiture in this country is visited upon the offender only, and upon his death the heirs receive the property. Corruption of blood is a memory of past days and of barbarous codes.

In the first part of this work the reasons for permitting inheritance are set forth. These reasons are not invalidated by crime of the ancestor. If the feudal word "escheat," meaning a return of an estate to the immediate lord for various reasons, correctly describes a vesting in the State of private property for various reasons, it is not based on the feudal notion of original grant or of ultimate property. But the custom and principle remain, of ascribing an ownership to everything capable of ownership. In case, then, of intestacy and failure of heirs, either not existent or incapable of receiving property, it properly vests in the State as representing the people and as a trustee for their benefit. This describes the acquisition, but not the tenure of property so obtained. The principle has been set forth that possession of property by the State is to be justified only by the fact that it serves as a part of, or an adjunct to, a recognised governmental function. But the holding of property acquired by methods like escheat or confiscation does not serve such purpose, and therefore is not within the limit of governmental functions. Such property should be converted to general uses.

That which is termed public domain may have been obtained by gift, by conquest, or by discovery, or it may be unoccupied or unappropriated lands. The idea of sover-

eignty is here exhibited and the principle of ownership of everything which can be owned. The United States is possessed of large tracts of land mainly acquired by extinguishment of supposed Indian titles, an acknowledgement of tribal sovereignty. Such lands, not being held in severalty, passed into possession of the State, and are held by a sort of *ad interim* tenure, only until they shall have passed into private ownership or shall be devoted to some specific and legitimate public purpose. The policy of The United States has been to encourage settlement and private ownership, or to devote the lands to the creating of public schools, to highways, or to other purposes of a general public nature. This *ad interim* holding, with subsequent legitimate uses, accords with the just principle of State ownership.

The modern theory of sovereignty is illustrated by the modern phrase "eminent domain." It recognises the supremacy of public over private interest, the greatest good of the general interest of the community being intrusted to the care of the State. The right of eminent domain is an acknowledged attribute of government. It vests a power which must be exercised with the utmost care if an undue encroachment on private interests is to be avoided. At its very best, the power to absorb private property, even if the pecuniary compensation is adequate, enforces a concession of private rights; for pecuniary values are not the only values by which a property right may be estimated. Personal sacrifice for the general good still may be exacted; and the fact that the individual as a fractional part of the general public receives a fractional part of the general benefit does not lessen that sacrifice.

The right of eminent domain needs to be surrounded with enforced precautions against its abuse. In former times the constant effort was to protect the people against excess, or misuse, of personal prerogative. At the present time people need to be protected against

misuse of legitimate governmental functions. The Constitution of The United States provides that no person shall be deprived of property "without due process of law, nor shall private property be taken for public use without just compensation." All such provisions need to be supplemented by legislative and administrative acts to effectuate their interest. It is the nature of Constitutions to deal with generalities. In some instances can specific commands or inhibitions be stated in explicit terms; but mostly a principle alone can be announced, and governmental action be left to sustain that principle and to move in accord with the spirit of the Constitution and in harmony with the design of the whole instrument. The phrase that "no private property shall be taken for public use without just compensation" implies the idea of the paramount importance of public works, but, so far at least, leaves indeterminate the nature of such works, or of the governmental functions concerned in their operation. The phrase "due process of law" leaves unexpressed any particular system of law to which the term may be applied. It is designed as a protection against arbitrary and illegal acts of those having the opportunity to exert them. It places everyone under the guardianship of the law of the State of which he is a citizen or a resident. It is not within the province of a Constitution to trench upon the jurisprudence of a State nor upon its method of administration. It announces principles of right, and inaugurates a system to be administered according to the genius and spirit of the instrument creating it. A mal-usage of legal functions may violate a Constitution, as well as a disregard of direct provisions.

In the exercise of the right of eminent domain certain precautions must be regarded. It must distinctly appear that the works to which certain private property is essential, are justly public works which are within the province

of the State to undertake; that compensation is adequate with reference to circumstances which create value; that no unjust discrimination in the selection of property is made. It is conceivable that each of these errors might be committed without direct violations of the rules of just compensation and due process of law, there being a certain degree of discrimination necessarily left to administrators of governmental functions. Yet they might at the same time violate the Constitutional principles of the proper sphere of government, the general rights of property, and the equality of human rights. It may perhaps be safe to assert that general and comprehensive assertions of right and duty are more efficient than are particular provisions. It is not always easy for people to distinguish between works of a public nature and distinctly private enterprises, especially so when it is common to intrust to private hands work clearly within the province of the State. This is a matter of policy to be judged by its results, and to be altered or abandoned as present circumstances may demand. This custom may have vested too much power in corporations or in individuals, and this power may have been abused.

These facts sometimes create a demand for State assumption of property even beyond that which its legitimate office permits. The general tendency of humanity towards extremes seeks a safe remedy for an abuse in an opposite course. At present there exists a social tendency, demanding State ownership of all works of a public character and, still further, State assumption of land,—an instance where socialism allies itself with paternalism. It is a new form of an old contest between too much and too little government. We have been accustomed to think that progress in governmental science has been in the direction of diminution of governmental functions and a corresponding increase of personal independence, and that private ownership was to be preferred

to public ownership. These have been favourite theories in this country. The present agitation, then, seems a recurrence to ancient notions. It is probably not based on a general theory, but expresses a dissatisfaction with existing conditions or with present methods. A better means of correcting an abuse may be to correct the mode of administration, rather than abrogate a system. Many private enterprises are undoubtedly within the category of public functions. Railways, almost universally in this country under private management, are an extension of the highway and post-road system. But the intrusting of public works to private management does not relieve the State of the duty of supervision over such works in the interest of its people. Both the right and the duty exist to enforce such management as the public needs require, and inferentially to assume direct control if circumstances make it necessary. The private control while existent is only permissible, and is a matter of State policy. The grounds, then, on which possession of property by the State is to be justified, are the direct needs of property for recognised public needs, as a necessary adjunct to admitted governmental functions, and a trusteeship of lands when private ownership does not exist or cannot conveniently exist.

Sovereignty exhibits itself most conspicuously in the position which the ruling power in a State occupies in all relations between independent communities. There is an aspect of paternalism in the guardianship of its citizens which the State exercises in all external matters. In international intercourse States alone speak and act. This position is recognised by International Law. The justness of the term "law" as applied to the proceedings and obligations of nations as to one another, might be questioned. Law implies the power to compel obedience to its behests. The primal rule among sovereign nations is equality, a position which recognises no superior capa-

ble of giving commands or of enforcing them. Still, in a qualified sense, the term is a just one. Long-continued custom, the practice of prominent nations, and the compacts established between them have created a rule which all nations are at least expected to observe. The same principle of the rights of humanity and justice, derived from study of man's nature, determining the law within a State, gives equal foundation of rights and duties in the relations of independent States. The writings of jurists, the decisions of courts, and the conferences of national representatives aid in giving shape to a body of rules and precepts to which the term International Law has been applied. It is true that there is not, nor is it likely that there ever will be, a tribunal with authority to determine international questions, still less to enforce obedience to its decisions. But the penalty for infraction of international rules lies in the probable use of force by other nations, in exclusion from the benefits of the law, in retaliation in the future, or in justifiable war. Strong powers have been too much disposed to disregard the just rights of weak ones; but conditions have much changed with the progress of civilisation, and it has become the acknowledged interest of States to compel the recognition of the rules of international intercourse. In the continued development of International Law there have come to be two departments. In the older one are found negotiations, and compacts, and rules of war, in which States are considered as entities, as aggregations of peoples.

There is a growing department of the Science and one from which much good is to be expected, in which individual rights are the principal subject of consideration. This has received the rather awkward title of Private International Law. The facilities of modern intercourse have added to its importance, and this fact emphasises the need of a system of rules governing the mutual rights

of States and of the citizens of different States. Though the State is the sole representative of its people in all foreign relations, the department of government is most directly concerned with those State functions which guard the rights of individual members of the community as to foreign nations and the rights of foreign residents within the State. These are legitimate functions of the government. Private International Law thus has an important bearing on the extent and nature of these functions.

The principle that every State is supreme in its control over all persons within its jurisdiction, though subject to some modification, lies at the foundation of International Law. All persons are to be classed as citizens or aliens, with different rights and different duties; and citizens are also of two classes, those as to whom citizenship is innate, and those who have become citizens by direct choice. All natives are citizens of course: they in fact constitute the nation, and have a claim which cannot be denied. In a prior chapter the power of a State to expel any of its citizens has been questioned, but there can be no doubt that the power of self-expatriation should exist, subject to certain qualifications. There are duties owing to the State which cannot be discarded at will; and therefore the right of a person to abandon his allegiance and the right of a State to adopt a citizen of another State must be subject to certain considerations, to be adjusted according to the spirit of justice. One of the functions of the State, then, is to determine what obligations must be fulfilled before the power of expatriation may be exercised. Citizenship has its duties as well as its privileges. It is also a State function to fix the terms upon which foreigners may be naturalised, as no State can be compelled to grant that right. It is an act of grace or an act of policy. It is within governmental discretion to decide whom it will admit and exactly on what terms such admission may be granted, and necessarily so, as the integ-

rity of a State may easily be imperilled by an injudicious extension of citizenship. The right acquired by birth and the right acquired by adoption should differ only in origin, not in privilege. With judicious caution in the admission of members, a single plane of citizenship is for the best interest of the nation. The relative positions of citizens and aliens have much changed since ancient times, as all political affairs have changed, and the difference now is mainly one of civil duties and of participation in the affairs of government. In all modern governments the citizen plays a part formerly unknown. The power to hold office and to elect representatives or officials on the one hand, and the duty of supporting the government and protecting its integrity on the other, are offices which citizens alone can fulfil.

There are, then, within the jurisdiction of a State and subject to its laws, two classes of persons: citizens, and foreigners either domiciled or temporarily resident. Naturally, foreigners are excluded from all political rights, their allegiance being elsewhere due; and it has been much the custom to limit their legal rights in some respects, not trenching upon natural rights, but as associated with a governmental polity. Aliens have been forbidden to hold landed property on the theory of some important connection between such estates and governmental power and authority. This reasoning we find difficult to understand at the present time. A more reasonable assumption would seem to be that as land is entirely within the control of the State, it would be a security for the good conduct of its possessors. A motive for the avoidance of war would be found in the fact that by war the immovable property lying within the country of the combatants would be imperilled. It is more consonant to advanced conditions of governmental policy to grant equal legal rights to all within the jurisdiction of the State. Whenever the solid rights of humanity are in

question it is the duty of a State to insist on their being accorded to its citizens when in foreign countries.

The acknowledgment of this right of insistence and the credibility given to the laws of one State by other States are two important features of private international law. Their development will greatly serve the progress of Political Science from the fact that their basis lies, not in customary growth or in arbitrary governmental rulings, but in material principles of human rights, which it has been the purpose of this work to designate as the sole foundation on which political philosophy can rest. Nothing in the history of international relations is more striking than the change which in progress of time has occurred in the treatment of foreigners. From absolute inhumanity to a concession of all important rights is a long step, only to be accomplished by a direct progress of prominent nations in the same direction. And now it is the rule adopted by treaty, or existing by force of general comity, to concede to aliens rights not political, which appertain to citizens, and with equal means of redress. This rule is general among nations which have reached a certain stage of political advancement, and a peculiar effect of this rule might be that aliens might, in fact, have a better guaranty of right and justice than that afforded to citizens. A citizen in the case of a lax administration of the law has no recourse except to his own government: a foreigner, besides the equal rights which the rule affords, may command the intervention of a State jealous of the interests of its people wherever they may be. A marked instance of the difference of personal status is exhibited in the position of foreigners in States of a semi-barbarous nature. Advanced States are not willing to subject their citizens to operations of systems of jurisprudence differing materially from their own. It is customary in such cases by treaty to stipulate that their subjects while resident in such countries shall be subject

to the jurisdiction only of the Consuls of their own government, or to a mixed tribunal as specifically provided. It is, then, one of the functions of the State to protect its citizens when in other countries, and to assure them justice according to the best conception of human rights.

That feature of Private International Law, which concerns the force given to laws of a State outside its jurisdiction by the consent of other States, is perhaps of still greater import as to the purposes of Political Science, since it implies a larger agreement of different peoples in the principles on which the science is founded. There must be a concord of political and legal systems. The sanction given to foreign laws is by what is termed comity, each State being supreme within its own jurisdiction. This comity is not of sentiment but of utility, of reciprocity, and may become merged into necessity. Historical progress leads to conditions in which comity is made possible. Facilities for social and commercial intercourse of peoples, created by modern inventions, have produced a relationship of nations in which a state of interdependence has arisen. One may say that the principle of division of labour has been extended to nations. To a certain extent they exchange products to their mutual advantage, and this advantage is not confined to material things. There is an interchange of knowledge, and the benefits of scientific research are not limited to any one country. Politics has its share of the benefits coming from intercommunication, and the example of one nation in political advancement is not lost on the others. The tendency of States under modern conditions is to approach one another, to attain a degree of uniformity in at least the essential features of government. Exactly as the degree of uniformity is the advance of private international law possible. There must be a consensus of opinion in the vital principles of governmental science. But even though States seek the same end, special circumstances

demand a difference in methods. The two great systems of jurisprudence, the Civil Law and the Common Law, are instruments for a similar purpose, but there has been a marked difference in their development and in their methods. The constitutional and legal systems of a State necessarily form a somewhat complicated body, in which rules and conditions interact. Hence the introduction of a foreign element is liable to have a disturbing influence and remote consequences. As it is essential, if credence is to be given to a foreign law, that no principle of practice is to be violated, there may then be conflicts of principle and conflicts of system. The march of events, bringing States and peoples closer together, has impressed the fact that a mutual concession of rights as between States is not only a wise policy, but is a necessity if the advantages of mutual intercourse are to be preserved. In accordance with the plan adopted throughout this work, the endeavour will be made to determine the principles on which international concessions rest as derived from the nature and purpose of States.

There seems to be no well-defined term to express the sanction which is conceded to the laws of a country outside of its territorial jurisdiction. The whole subject might form an interesting branch of International Law, and be termed International Jurisprudence. But the particular acknowledgment of a foreign law may for the present be termed Concession. Between concession and State autonomy there is a sort of conflict. Every State determines the system of law to which all persons within its jurisdiction are subject. This is autonomy. Extraterritoriality, or jurisdiction by a State over persons or things without its territorial limits, is a denial of autonomy as to that State within whose territorial limits such jurisdiction is exercised, to a limited extent and in special instances. It is forced upon some States whose system of laws does not conform to the notions of justice preva-

lent in the most advanced States. It is an exception to the rules of autonomy, conceding the right to fix the legal status of a people, the capacity to perform legal acts, the nature and form of legal acts and their consequences, and to constitute remedies for abuse of their rights. As autonomy is of general application, it follows that no State can, except as previously mentioned, impose its laws upon another State, and that concession is the voluntary act of the State granting it. Being voluntary, it is governed by the question of expediency.

The jurisprudence of a State is complex. There is an interdependence of laws. Certain laws are what they are by reason of pre-existing laws, or depend upon a certain established legal status. The consequence, then, of giving operation to the laws of a foreign State might be the destruction of harmony in an established system of jurisprudence. The moral tone of a community might be affected by the recognition of foreign laws, though differences of this nature are easily adjusted by treaty. There are, however, circumstances in the relation of States to one another which favour international concessions. Intercommunication of ideas upon all subjects, especially upon political and jurisprudential matters, tends to assimilation, and, with the gradual development of ethical and political ideas, to approximate the bases upon which the legal and political structures of different States rest. All directions towards similarity of political doctrines serve to favour the mutual recognition of legal acts under the jurisdiction of foreign States. Modern conditions of international intercourse not only favour but make imperative such recognition,—imperative not in a sense destructive of State autonomy, nor detracting from the voluntary nature of the recognition, but imperative if a people is to receive the profit and advantage coming from international intercourse. There must be a certain mutuality, and advantages must be given and received.

A method is to be sought for reconciling autonomy and concession, if admitting, as far as is advisable, the laws of another State, without violating the moral tone of the community or the legal system of the State acknowledging them. This demands a consideration of the general nature of jurisprudence.

It is the custom to divide the rights which are within the province of jurisprudence into two classes. The first class is that of absolute rights, which concern the individual *per se*. Rights of this nature are regarded and protected by all States with greater or less degree of completeness; and herein each State applies its own method of protection. There is then little, if any, opportunity for concession to the methods of other States, excepting in cases when the doctrine of extra-territoriality is applied. The second class is that of relative rights, arising directly or indirectly from the relation of the sexes, as those appertaining to marriage, infancy, guardianship, and descents and inheritance. These rights, like others, have their foundation in the natural laws of humanity, but are subject to a certain degree of arbitrary regulation. Thus the State prescribes the qualification for matrimony, the period of infancy and guardianship, and the rules of inheritance. The right to enter into contracts, in itself an absolute right, is qualified as to mode of creation and continuance. As to contracts, then, and relative rights, the State defines a legal capacity and creates a status, and these are continuing conditions. They become thus properly subject to international concessions. A State may recognise the right and duty of another State to fix the legal status of those within its jurisdiction, and may within its own territory acknowledge this status as valid, but may subject it to the operation of the laws of the State applying them. Herein lies the opportunity for the conciliation of autonomy and international concessions, by permitting the

personal status and legal capacity, hence the legality of acts, to be governed by the *lex loci*, the consequences and the mode of enforcement to be governed by the *lex fori*.

The subject of marriage is not only the most common in international jurisprudence, but also serves as its best illustration. Marriage is usually described as a contract. It doubtless has one feature of a contract, being a voluntary agreement between persons. Other than that it lacks the attributes of contract. Even as an agreement, it is one when the act of the parties is circumscribed. They have simply the power of assent, but not the power to impose any qualification or limitation. The conditions are fixed by law. It may more properly be described as a status which is strictly regulated by the State. The voluntary feature, in which it alone assimilates to a contract, is at an end when the status is assumed. Considering how great is the latitude properly conceded to contracts and how little to the status of matrimony, the term is a misleading one, and the misuse of a term leads to many honest but false conceptions. Marriage is the most universal of human institutions; hence the obligation of its recognition by all States. The consensus of opinion in all civilised communities favours monogamy, and the obligation to recognise polygamy cannot exist. Both the religious and the legal systems of some States impose certain qualifications and ceremonies as the conditions of assuming this status, and may justly impose similar conditions as to its recognition when assumed in other States which do not demand the same qualifications. There are also certain conclusions flowing from the condition of matrimony which involve questions of guardianship and inheritance and the descent of property. From this illustration are derived the principles that the universality of an institution makes its recognition imperative, provided in special cases it does not violate the moral or religious tone, nor conflict with an established legal

system, and that while a status or condition created by a foreign State may be held valid, it must still be subject to the operation of the laws of that State in which it is sought to be upheld.

When questions of jurisprudence become international they are further complicated by conditions as to places and persons:—as to places, where an injury to be remedied has been accomplished, where a relation has been assumed, or where an agreement has been effected; as to persons, whether those concerned are citizens of the State, whether the right is to be enforced of a foreign State, or partly of the one and partly of the other. It is a frequent question whether a judgment obtained in one State may be enforced in another, the fact sometimes being that it cannot be satisfied in the place where rendered; and this opens an interesting question of comparative jurisprudence. A judgment is the application of the law of a State to a question of the rights of persons under that law and according to the methods provided for ascertaining those rights. It is evident, then, that unless both the laws and the modes of procedure in two States were coincident, the enforcement of a judgment obtained in one State by another State might be a violation of its laws. A State cannot administer the laws of another State, nor permit its citizens or those within its jurisdiction to be affected as to person or property excepting according to its own laws. At the same time remedies sought in one country for acts and injuries effected in another might be inefficient from the difficulty of obtaining the evidence necessary to support the claim for redress. A middle course might best serve the purposes of justice; viz., to give such credence to a foreign judgment, both as to matters of fact and of law, as the difference in the legal systems of the two countries will permit, or to make it the basis of a legal action. Crimes and mere civil injuries are placed on a different footing, and

their practical treatment is of a different character. The distinction between these two classes is not always obvious. In the one case the initiative of remedy is to be taken by the persons injured; in the other, the remedy or the punishment is applied directly by the State, and the offence is considered a public offence. An injury may affect the public directly, as in treason, in sedition; or it may be directed against an individual and be solely influenced by personal malice, and at the same time be regarded as a public offence. A distinction may be founded on the fact that crimes affect directly the personal rights of humanity, that they cannot be easily guarded against, and that the perpetrators are usually of a character dangerous to the community. Rigid repression and deterrent measures are therefore necessary. The fact that crimes are offences against the State and are treated directly by the State, facilitates international treatment. As to the constituent elements of the most common crimes, there is an agreement of opinion amongst all nations, though the methods of trial and punishment vary. It is an almost universal rule and practice that crimes are to be regarded as local, to be subject to punishment only within the territory where committed. Hence international remedy must consist in the surrender of fugitives from justice. Extradition is ordinarily provided for by treaty, but voluntary extradition is sometimes offered and accepted. Voluntary extradition may or may not be a possibility, according to the authority which is granted by the Constitution or the laws of a State; but it should be governed by the rules which commonly govern extradition by treaty.

The base of extradition is to be found in the facts: that because of the local nature of crime, the evidence supplying its proof are usually to be had only where it is committed; that facilities for the escape of criminals diminish the deterrent effect of punishment for crime;

that it is not for the interest of States to afford an asylum for criminals or to receive undesirable persons within its borders. Certain rules governing extradition have become customary and are proper. Particular agreement is to be had as to the character of the crimes to which the treaty applies. This implies a certain degree of uniformity of the legal systems of the two States effecting a treaty. So does also the further agreement that the methods of proof and the mode of punishment shall not violate the principles of justice as maintained by the States respectively. It is imperative also that sufficient evidence should be supplied of the probable guilt of the suspected person and of his identification. Every State owes a duty of reasonable and just protection to all within its control. There is no citizenship in crime, and thus a person extradited may be a citizen of the State which surrenders him. Whether so or not, the obligations of justice are not affected. It is quite customary to exact a guaranty that the person surrendered shall be tried only for the particular offence for which extradition has been demanded; for the terms of surrender have applied to that offence only. Yet it would accord with the spirit of extradition that the surrender might apply to all offences included in the treaty, additional requisites being supplied, without a re-surrender.

It has been urged that what are termed political offences are not properly subject to extradition. What is legitimate opposition to existing government, what are justifiable causes of revolution even, are topics to be subsequently treated. But for the present purposes it is desirable to distinguish between crime as it is ordinarily understood and efforts for political regeneration. Even in legitimate warfare there are practices which the ordinary rules of war do not recognise as permissible. Under the guise of political reform it is often attempted to justify acts which are in reality prompted by personal vengeance,

or by an utterly mistaken idea of the direction in which political improvement should advance. It is a just rule that States should not interfere in the political relations of another government and its people. Such interference has usually been mischievous. On the other hand, States should not grant asylum to all who commit crimes from disaffection with existing political affairs. In politics there is a distinction as to remedial measures. Revolutions are not in the category of crimes; but neither revolutions nor attempts at reform should exempt what are ordinarily considered as crimes from their just punishment.

All subjects of international relations depending upon the action of autonomous bodies, either voluntary or as compelled by the pressure of circumstances, must be discussed with a view to their ultimate improvement. This improvement can only be reached by the assimilation of nations in advanced political knowledge and practice. Thus a more comprehensive political improvement can be attained than that which results from the effort of an individual State.

From a study of this topic we derive the functions of the State in international affairs. In addition to the ordinary relations of States to States as sovereign bodies, each State owes the duty to its citizens to assure them just treatment when in other countries, either by having the full benefit of the laws of those countries, or by specially organized tribunals. To fix the political and legal status of its citizens and of foreign residents and those domiciled; to give such efficacy to foreign laws as the principles of justice and of reciprocity may demand; to limit immunity for crime by denying asylum to the guilty; to make its rights respected and the liberty of its citizens enjoyed wherever they may be: these are some of the functions derived from the relations of States throughout the civilised world.

One of the attributes of sovereignty is force, the power of a State to maintain its integrity before other States, to compel obedience to its decrees on the part of those subject to its jurisdiction. If the postulate be accepted that power is inefficient unless supported by the general sanction of the people—the proportion of truth in this statement being as the liberal nature of the governmental system to which it is applied,—it is a statement which applies only to the aggregate of the people. There is always a sufficiently large number whose obedience is to be compelled by the constituted power of governmental authority. Force as here considered is not the force of absolutism or of extra-Constitutional effort toward absolutism, but such legitimate force as is fitted to carry out the Constitutional executive offices of the State. This requires a proper adjustment of power to its needs, but such adjustment is not always correctly made, nor is it easy. If power is in excess of just needs, abuse may result, or one department may override another; if deficient, administration is hampered, and law is in disrepute by inadequate enforcement, or even the integrity of the State is imperilled. Force is the necessary adjunct of administration.

State power comprises two classes of functions: the one guards the State as a whole against disruption or foreign encroachment, and even conducts an aggressive war when justified by circumstances; the other enforces the internal administration of the State. The first of these is effected by the military power of the State. The modern military system had its rise in the decadence of general militarism. An established army is the product of two factors, politics and economics. The feudal system made the whole nation a vast military camp. The tenure of all land was based on military service in all its gradations. It was a period also of loose governmental ties and of lack of centralisation. But States were in a

process of formation, and as this proceeded, feudalism decayed. As the modern State arose, with its central and ramified authority, feudalism disappeared as a system, but left its impress on jurisprudence, not for the best and not yet extinct. With its disappearance also disappeared the military features of civil life, and thenceforth the military department entered into the system of the State, being controlled and directed by the central authority. The economic reasons for an established army are of the same nature as that which counsels the separation of employments, the division of labor, and the efficiency which comes from a sole avocation.

The particular forms and methods of the military system vary in different States. Their respective merits deserve consideration. There are three systems of military establishments: the standing army, the militia, and that which is a combination of the two. For the purpose of waging war either for defence or for conquest and aggrandisement, a permanent military establishment is the most efficient and the most economical,—efficient, as thorough training and sole devotion to one occupation produce the best results; economic, as the ordinary avocations of life on which every nation must rely for its support need not be disturbed by the exigencies of military service. But war can only be considered as an exceptional condition in the life of nations; and that military body which in time of war is the nation's best safety, in time of peace is an encumbrance and a danger. It is an encumbrance, as the support of a military establishment imposes a tax upon the community. The degree of resulting danger depends largely upon the temperament of the people. As to the fact of its being a menace to the rights of the community, the evidence is to be found in history and in the nature of the military life. There is probably no one class in a modern community so far removed from the rest of the community in habits and

tastes as is the professional soldier. His associations are with his own class almost solely, and he thus lacks sympathy with the mass of the people. The training also is supposed to inculcate habits of obedience and the power to command. The ability to command is given to but few, and in a large body of soldiers capable leaders of men on a large scale are rarely found. But obedience is the primal requisite in military rule, and the training of the soldier tends to lack of independence, to a disposition to be led rather than to rely on his own judgment. It is natural and inevitable that the control and management of the military force be with more or less directness vested in the executive of the State. This fact, with the peculiar nature of the soldier's training, separating him from the people and teaching the lesson of obedience, has made encroachment on the liberty of a people by the military power, either under the direction of its lawful ruler or under that of a military adventurer not an uncommon occurrence in the past. But this particular danger is not so much to be feared at the present time. There are checks upon executive encroachment and upon military power imposed by most States, and the present character of most people forbids submission to this form of tyranny.

The present danger is the prevalence of modern militarism, very different from the militarism of the feudal times. Modern militarism means aggression and a disposition to territorial extension. It is a State militarism, needing for its support a highly organised military establishment, an immense drain upon the resources of a community. The aggressions of one State demand corresponding defensive measures on the part of contiguous States, and thus the evil spreads. This evil is fully recognised, and abundant contemporary exposition of its disastrous effect on a community is to be found. Yet the condition is one which hardly could exist without a

favourable temperament of a people. Either imperative circumstances or popular approbation must assert the continuance of this condition. The moral character of some people disposes towards the sentiment of what is termed national glory, of national aggrandisement. It is doubtful whether any career of conquest can be maintained if the military power is not sustained by popular sentiment; and when popular sentiment begins to count the cost of its existence, aggression must cease. Whether or not the aggressions of any one nation may be curbed by the power of international law or international sentiment, is a question of much interest. If three nations (as in the Dreibund) can unite to resist encroachment or attack, it is not incredible that a family of nations should oppose unlawful aggression and should determine in what unlawful aggression consists. International law sanctions war and permits it to intrude upon the ordinary rights of neutral people. It is, then, rightly within the province of international law to fix the character of a war to which this sanction may be given. This sort of international police regulation might serve a good purpose in the interest of humanity and justice.

The peculiar temperament, which easily receives the impress of military glory and the idea of conquest, has but little existence among the people of the western part of the Teutonic branch. The character of these people inclines them to political organisation, to development of the internal resources of a country, and to colonisation. With the lack of propensity toward military aggression is found an opposition to organised military establishment. It should be noted that colonisation may make necessary an additional military force; but this is a merely incidental need and not the direct product of the spirit of aggression. Both in England and The United States there has been a general resistance to the existence of a standing army, manifested both by popular

expression and by legislative tendencies. This feeling has been conspicuous in The United States throughout its national existence. It is one of the silent laws whose influence is always present. It would be misleading to suggest that this is an opinion or sentiment of absolute prohibition. Armies exist in both of these countries, though in vastly different proportions. The exclusion is not absolute, but limited to an indefinite ratio between military force and population which, when applied to the circumstances of each country, is supposed to afford the needed degree of safety.

The term "militia" describes a non-professional soldiery, and marks the difference between one whose whole occupation is that of arms and one who from his ordinary vocation devotes but a portion of his time to the acquisition of military skill and training. In a militia there is the largest latitude as to competency and to the methods of discipline. It is not to be expected that as applied to a whole community any militia system without an urgent force of necessity can approach to any degree of efficiency. Personal tastes and a degree of popular enthusiasm can alone supply the needed incentive for the application to military training. But a small portion, then, can acquire sufficient competency to be of much value as a military force. Such a militia may be of value in emergency, or as a support to the civil power; it cannot alone be relied on to supply the needed protection against foreign encroachment or domestic sedition on a large scale.

The mixed system of a regular army service and a militia in definite proportion is one from which better results may be attained. A writer of a recent review article has pictured the contrast between a soldier of former days and one of the present time. As he gives it, the bold dragoon and the *beau sabreur* of a former military period has disappeared, and his place is now occupied "by

a grave gentleman in spectacles." The contrast illustrates the scientific character of modern warfare. It is progressive as well. That a nation may be prepared to cope with other nations, it must be acquainted with modern military methods and equipped with modern military appliances. This makes imperative a permanent establishment of soldiery with officers educated in the most advanced school of military science; and this body of officers must be sufficiently large to supply the needed degree of military intelligence to the increased power demanded by warfare. The proportion between the permanent establishment and the militia, or between the trained military bodies of a State and the normal body of men capable of service, is indeterminate. The problem of this adjustment is requisite efficiency with the least possible burden upon the community. The German military system, the model of all nations seeking military renown, is formed on a different plan. The primal idea is the highly constituted army constantly recruited and as constantly depleted by a transference to a reserve body, thus forming an immense body of competent and skilled soldiery. It is organised militarism pervading the whole body politic. A contrast between these two systems reveals the difference which may be in the position, policy, and aims of States. The one system procures the highest degree of efficiency in warfare, and provides both security from attack and the means of aggression; at the same time it draws largely upon the economic resources of the State and imposes a social burden against which symptoms of popular revolt must be frequently manifested. The other, regarding peace as the normal condition of the State, imposes the least possible strain upon the prosperity of the country consistent with adequate preparation for emergencies. It is possible also that an aptitude and fitness for any one condition tends to perpetuate that condition.

The military force in its most comprehensive signification includes the naval service. But the navy is peculiar in that its maintenance in time of peace entails a large cost, but at the same time its services in the protection of commerce, of the interests of citizens in foreign lands, and of the guardianship of the waterways of trade are of great avail. It is a feature of the scientific character of modern military work that the general culture necessarily imposed on those who practise it qualifies them for service to the State other than the purely professional. The outlay in peace for the preparation for war may in a degree be offset by military service in important public works. The military force is, when occasion demands it, to be used as an adjunct to the civil power,—but only as its adjunct and not to supersede it. Thus the functions of the State, both legislative and administrative, as to the military force, are its creation and regulation, its increase according to just methods, and the determination of the period when the ordinary laws shall cede to martial laws. Powers of this extensive nature, vested in the governing body, demand checks and limitations in the interest of individual liberty and safety. These are to be provided by Constitutional provisions as to the military power of a State. They are properly to be included in the next chapter, treating of Constitutions.

The consideration of the force necessary to compel obedience to the laws of a State presents in tangible shape civil liberty on the one hand and the possibilities of its abuse on the other. In force there are always elements of danger. A power legitimate in its purpose but in excess of its needs involves a risk to personal liberty. This is the fault of the system. An abuse of a just and restricted power implies a general disregard by a community of the proper working of the system under which it lives. Force is the attribute of the executive depart-

ment of a State, though it also, to a limited degree, resides in the other departments. The functions of the executive department are of a dual nature, administrative in the operation of works of a public character, and executive purely in enforcing obedience to constituted law. These divisions correspond with the general divisions of governmental duties, the protection of personal rights, and the performance of public works. In the function of compelling obedience to law, force is essential,—but it must be regulated and restricted force. Might, then, must be in government; but might must be subordinated to right.

From the inception of a law, through the course of adoption and promulgation, in the determination of specific cases as to its violation, the remedy for abuse, and the penalty for its infraction, the three departments perform the parts which appertain to each. The adoption and promulgation come within the legislative office; but the application of remedies or of penalties is the joint action of the judiciary and the executive. This joint action is the security for individual rights. In this action the judicial department plays the most important and the most delicate part: it determines the fact of a law, the fact of its infringement, and with more or less discretionary power adjusts the remedy or the penalty. The executive enforces the decrees thus rendered, or in some cases enforces preliminary proceedings. Thus with but a small class of exceptions, presently to be considered, corrective measures are indirect, and do not proceed immediately from the executive department. The subject of force does not involve the question of the justice or the legality of the decree which it executes. Even the methods of execution should be defined and regulated.

The remedy or the penalty for an infraction of law acts upon the rights of persons which ordinarily come within

the duty of the State to protect. Thus it deprives the offender of property, it curtails personal liberty, it takes away life. There is a forfeiture to the extent of certain rights, and the governmental security as to these rights is withdrawn. This subtraction of rights should follow only upon such forfeiture and as an incident to reparation for an offence. When the executive power of a State is limited, in its application of force, to formulated decrees, any resulting injury to civil liberty is the consequence of faulty organisation, and is to be corrected by a change in Constitutional provisions. Executive force acting upon human rights should be in obedience to a final judicial decree, or upon a primary judicial warrant. There are some necessary exceptions to this rule. In the performance of certain police functions summary arrest is an essential incident; but here there should be immediate submission to judicial decision. *Habeas corpus* proceedings are designed to compel such submission. There is a limited degree of direct force resident in legislative bodies, considered as essential to the maintenance of order and to the proper discharge of legislative functions. Similarly the judicial department must possess the power which its office demands. In these instances the action is direct and immediate, and therefore should be carefully restricted by Constitutional or legislative provisions. The power to deal with technical contempt must be carefully defined in the interest of personal safety. Blackstone pronounces one of the glories of the English law that it defines "the times, the causes, and the extent, when, wherefore, and to what degree imprisonment of a subject may be lawful." The direct power of the executive in the enforcement of the payment of taxes is to be considered in the topic of taxation.

There are two very important rules respecting the nature and degree of force to be vested in the State. The judicial and ministerial offices should not reside in the

same body. There should be in each body "the least possible power adequate to the end proposed." These rules are designed to guard the civil liberty of the individual, and at the same time to secure efficiency in the governing body.

## CHAPTER IV

### STATE FUNCTIONS AND THEIR METHODS—*Continued*

TAXATION is the compulsory method of obtaining the pecuniary support of the State. Its justification lies in its needs. As to the persons who may be held liable to taxation, and as to the reason of their liability, various theories are held. The practical application of these theories frequently encounters many obstacles. There is a general obligation on the part of all citizens to contribute to the support of the government in various ways, and taxation is one of the ways. Primarily it would seem that this obligation should rest equally on all citizens, as they are supposed to have an equal share in the benefits which the State affords. A distribution of dues according to this general sense of obligation would seem to be just. But it would soon appear that this equal distribution would impose an unequal burden. A capitation tax must be adjusted to the pecuniary capacity of the poorest in the community, to avoid too severe an imposition upon some classes of people. But that which would be a reasonable and just choice upon some would in effect be scarcely perceptible to others. Thus though the rate of taxation might be equal, the actual burden of taxation would be uneven, varying according to the pecuniary ability of the individual. Here, in addition to individual obligation, there enters the element of varied competency, and the idea of equalising the pressure of liability.

The two systems may coexist and a general capitation

tax may be supplemented by a tax adjusted to personal resources. It is often attempted to explain and justify a tax on property by the notion of additional care and service rendered by the State and of a corresponding benefit received by its possessor. This explanation lacks definiteness. It is impossible to determine the degree of protection which property demands, and it would be unjust to assume that property should have privileges for which compensation may be made. The protection which the State accords to life and liberty transcends that which it grants to property. A tax on property, then, based on immediate benefit, will be of very limited extent and bear a small proportion to the whole range of taxation. But the general notion that the security which governments afford creates the reciprocal obligation of support is still tenable. The obligation applies to the citizens of a State, with such exceptions as a wise and humane policy may dictate; and it may properly apply to persons other than citizens. Persons who are only temporary sojourners are supposed to be subject to taxation in the State to which they owe allegiance, and the comity of nations demands their exemption; but domiciled persons, or they whose residence has somewhat of permanence, or who have business or other interests in a State of which they are not subjects, receive from that State benefits similar to those enjoyed by its citizens. Though they do not assume all the obligations of citizens nor acquire political rights, it is just that they should be subject to taxation. The reciprocal notions of protection and obligation are here applicable.

It is probably true that most systems of taxation are crude and imperfect, and that they usually disregard the basal principles on which taxation should rest. And this arises partly from the difficulty of adjusting taxation in accordance with these principles, and partly from the disposition to seek the easiest means of effecting the

largest results. At the back of this, then, lies a general idea of equality, but of equality within a class rather than as to a whole people. A vague idea prevails, with greater or less degree of truth, that, as a consequence of the complex nature of business affairs and of their interaction, a tax on any one species of property affects more or less directly many other kinds, and imposes to an indefinite extent a burden of taxation on the whole community. It is obvious that considerations of expediency should not override the claims of justice and of equal rights, and uncertainty of the operation of a tax does not commend it. We have thus far obtained the principle that the persons subject to taxation are the citizens of a State and others whose length of residence and whose interests within a State justify the imposition of taxes, and that a tax upon them should be proportioned to individual wealth with a view to equalise the burden of taxation. It is consistent with these principles that an immunity from all direct taxation should be allowed to some whose condition is such that taxation to any extent would be an intolerable burden. The tax proportionate to individual wealth need not exclude a capitation tax, which must be adjusted to the lowest personal ability. Thus far as to the personality of taxation.

The tax fund in any country, the fund on which all taxes are assessed, consists of all the material resources possessed by those subject to taxation. These resources are of three kinds: the profits of labour; capital, or the accumulation of labour; the profits upon capital. There is a corresponding division of people into classes: of those who are simply labourers; those who unite their labour with the possession of capital; and those who subsist on the interest of capital. Of these three classes the last one named is, in every country, extremely limited as to numbers, of little importance in economic matters, but still to be taken into account in the question of taxa-

tion. The class of simple labourers is much larger. But by far the most extensive class of all is that which contains those whose labour is assisted by the possession of capital to a greater or less extent. This fact appears in the extreme comprehensiveness of the term "capital," implying that which aids labour in whatever degree. Hardly any kind of labour operates without the assistance of capital. The simplest tools of the labourer are capital, and if we give the term its legitimate extension to educated skill, capital and labour measured by their product are inseparable. The effects of connected capital and labour must be placed to the credit of either the one or the other, usually of that which is the most prominent. For the purposes of taxation, they are to be treated apart only when severable. These are the classes of people who contribute to the support of the State, and these are the classes of material resources forming the general tax fund of the nation. The problem based on these facts is to so adjust taxation as to produce the means necessary for the support of the State, in the most economical manner, with the least disturbance of industrial affairs, and with the highest degree of uniformity and equality in its bearing upon the people. Taxation proportional to individual resources is of so universal acceptance as to remove it from the field of discussion.

The peculiar and differing purposes for which taxes are laid create a variety of kinds, and effect a certain correspondence between kinds of taxes and differences in the tax fund. The primary and most general purpose for which taxes are imposed is the continuing support of government. How is a constantly recurring tax to supply a constantly recurring need? This feature of continuity associates the tax with a similar feature in the tax fund. A continuing tax can be derived only from a continuing fund. If the fund is stationary and the

taxes regularly recurring, in time the fund is absorbed; or if the fund increases periodically by less than the periodic tax, the same result is reached, though in a longer time. Capital, if it increases at all, is of so slow growth that, compared with the other divisions of the tax fund, it may be described as stationary. This fact dissociates it from a periodic tax. A tax on capital is exhaustive of the very fund on which it relies. But the profits of capital or the profits of labour possess the very element which distinguishes an annual tax. A constant demand is to be met by a constant supply. We cannot escape from this natural association. Though a tax may be assessed on capital, it must fall upon profits, excepting so far as capital may at times be required to supply a deficiency of profits.

The very general custom of assessing taxes on capital is not based on scientific principle, but on the facility of assessment and certainty of collection. But this severance of connection between a tax and its appropriate fund and the adjustment of a continuing tax to a stationary or but slowly progressing fund, may in certain circumstances produce a grievous hardship. The profits of capital are very variable; at times non-existent. If annual taxes are laid on property totally unproductive, the tax is to be derived in one of two ways. It may be paid from the resources of the individual charged; in which case such other resources being already assessed according to the system of specific assessment bear a disproportionate and unjust share of obligation, or if properly exempt are unfairly charged. It may be derived directly from capital; in which case the owner is deprived of his property to that extent: as far as it goes it is confiscation. If the purpose of taxation is to carry out the socialistic notion of absorption of all capital by the State, a tax on capital would act in that direction, but too irregularly to suit the socialistic idea. It is not wisdom on the part of govern-

ment to discourage frugality and accumulation by imperilling to any extent the savings of labour. It is sometimes suggested that property which is susceptible of improvement remains unproductive for speculative purposes, to await an increase of value effected by extraneous circumstances. It is difficult to know the motives operating personal action, how far influenced by compelling circumstances and how far by unfettered choice. But it may justly be assumed that property is rarely unproductive by the will of the owner. Few have the inclination or the ability to dispense with present profits for the sake of future benefits. An intent to discourage voluntary unproductiveness or to prevent the "unearned increment" should not enter into a scheme of general taxation. Effects should be limited to what they are intended to reach.

Assuming that the tax fund as to capital is not capital itself, but its profits, a difficulty is encountered in determining what those profits are. To meet this difficulty capital is to be differentiated as to its profits. In the case of investments for profits only the actual sum realised is a determinable fact. When capital, in whatever form, is held for the personal use of the owner, the profits are not to be estimated commercially, but the profit is in the use, and it may be assumed that all the profits of which, in that form, the capital is susceptible is realised, otherwise it would not be so used. In these two cases the profits are ascertainable, the one being accurately known and the other assumed. But in the third case, when the profits are partly in personal use and partly in pecuniary return, the difficulty in determining the total profit is manifest. Farming property is of this description when it is cultivated by the owner. The returns are partly in subsistence and partly in money. This last case imposes the largest difficulties in the equitable adjustment of taxation. This difficulty and the large extent of prosperity

of this last class, where the profits can rarely be ascertained with perfect accuracy, may serve to account for the general practice of placing taxation upon capital itself and not directly upon its profits. If the principles above stated are correct, a tax of this kind must bear a just and proper relation to profits, the source from which all regular periodic taxes are derived; otherwise the fault will be committed of disturbing just relations and of separating a tax from its appropriate fund.

The profits of labour which may be subject to taxation are such as can be pecuniarily estimated. But this is not a true measure of the real value to the community of any specific labour, nor of its equality. These may be negatively considered in exemption from taxation for specific reasons. The profits both of labour and of capital have the element of continuity which constitutes the tax fund for periodic taxation. There are between them some influencing differences. Capital and its profits are supposed to be permanent. Labour and its profits cease with the life of the labourer or terminate with his disability, excepting when the surplus or unexpended profits have been capitalised: in this case they pass into a different category. The principle of imposing the burden of taxation according to the resources of the person, leads naturally to the notion that there is a certain minimum of personal profits subject to taxation; that below a certain line, whose adjustment must be governed by circumstances, profits bear so small a proportion to human necessities that they should not be required to contribute to State support. As a fact, this minimum line is applicable both to the profits of labour and of capital, but its place is affected by this aspect of permanence. The profits of labour are not totally applicable to the support of the labourer. The uncertainties of existence, the need of future support of the family, and other considerations of a like nature forbid the complete absorption of profits

and necessitate accumulation. But the permanent character of capital, subject however to some vicissitudes, does not demand accumulation. Hence the minimum line of taxation needs to be differently placed. The range of exemption is larger as to profits of labour than as to profits of capital.

The wisdom of frugality and of accumulation for future needs just considered, and the fact that all such accumulations become capital, suggest some popular misapprehensions as to the nature and office of capital. A very common hostility, which improperly includes all forms, is felt against the larger aggregations of capital. This subject has been considered in a prior chapter. The fact is that these larger fortunes are but a very small portion of that immense supply of capital diffused throughout the whole country, aiding labour in all its forms and making progress in civilisation a possibility. One should consider the immense number of persons incapable of self-support, the amount of advantageous labour of the highest class but inadequately remunerated, the beneficent institutions, all of them resting on the capitalised accumulations of previous labour, to appreciate some of the offices which capital performs. Censure should be reserved for the abuse of functions.

A tax on income is a tax on profits, and in this respect as a continually recurring tax, adjusts itself to a constantly recurring fund. It also proportions the obligation to the capacity of the one on whom it is imposed. In these respects it conforms to the best theory of taxation. But there are practical difficulties to be encountered. Being a tax on profits, its application is difficult of determination, as instanced above, when the profits are partly in use and partly pecuniary. The cumulative quality sometimes applied to an income tax differs from the proportional method in being, like some other forms, a regulating tax; and as such it will hereafter be considered.

To accomplish the just and equitable offices of taxation, it is probable that no one method will alone suffice. A combination of methods looking to a common end may be more effective. An annual imposition upon annual profits may need to be supplemented by a tax upon property in order to accomplish the same end by different means, owing to the various methods in which property is utilised, the principle of the adjustment of taxation to its appropriate fund being always kept in view. But these methods should not overlap and thus effect double taxation.

Incidence of taxation is a term used to designate the persons upon whom a tax ultimately falls; and the question of incidence applies to direct as well as to indirect taxation. It is of first importance to know not only the incidence, but also the degree, of taxation. Uncertainty in this respect makes the power of taxation a dangerous weapon in the hands of the governing power. From the point of view of the assessor, uncertainty in these two respects is a marked advantage. It avoids the possibility of individual question. It conceals the extent of the imposition which the individual bears. From the point of view of Political Science, uncertainty as to incidence and degree is not a wholesome condition. Of indirect taxes, customs are conspicuously open to this objection. The total amount to be derived from them during any one period is uncertain of computation, they being constantly influenced by the varying conditions of commerce, and can be only approximately predicted. But the individual does not know the extent of the obligation he bears, or the fact that he bears any at all. Conscious that it is to be placed somewhere, there is always the latent hope that the burden is adjusted to other shoulders than his own. This precludes remonstrance. In the so-called direct tax there is sometimes an indirection. The so-called single tax as explained by its advocates is not a tax in the just

meaning of the word, its purpose being the absorption by the State of all lands and effectuating a condition in which the State is the actual owner, and the nominal owner a tenant, whose rent is the total income value of the land. The debates on the plan seem not to have been clearly presented. If no compensation is made, there is confiscation under the guise of taxation, based on the theory that private property in land is invalid. A tax on land, as a sole or at least a prominent tax, is sometimes justified by the statement that, although it immediately affects the possession of the land, it ultimately reaches all members of the community, all persons being in some degree dependent upon the use or products of land. Hence the indirect effects are perhaps more difficult to trace than in the case of customs. Incidence, then, is a very important element in taxation, in the interest of equality.

The area of taxation has a direct bearing in the theory of reciprocal benefits and obligations. The political divisions of a State are adjusted sometimes with reference to density of population, and these not only affect the special needs, but impose a degree of obligation proportionate to such special needs and benefits. The purposes, whether general or special, are here determinative. It is consonant with this theory to effect a division of taxes, or rather a gradation, and to impose one or more grades according to the respective benefits which the individual enjoys. But whatever the classification adopted, within the limits of such classification individual equality should be found. It is an essential feature of annual taxation that the sum to be realised should be capable of computation in order to equal the sum needed. Any mode, therefore, which lacks the necessary degree of accuracy as to results, fails in the requirements of a periodic tax.

The notion of taxation has thus far been limited to

that designed to obtain revenue for the ordinary and regular support of government. Though this is the primal and the most important interest, it is not exhaustive. The offices of government are often special, to affect particular interests as opposed to general interests, or to accomplish a corrective purpose. In the first instance, the revenue produced by the special tax is specifically applied; in the second instance, the revenue is merely incidental. The area of taxation is frequently restricted to accord with the area of benefit, and this is consonant with justice, that a special work should be supported only by a special tax. There is a difficulty, however, in making a just apportionment, of distinguishing between a general and a special benefit. Highways are for public use without restriction, and although as to any specific portion a larger use may enure to the neighbourhood, the position is relative, and as to the whole system is uniform. Special taxation here would be misplaced. A peculiar distinction is very generally recognised in the streets of cities, of imposing on the abutting owners the tax of the care of the sidewalks. Streets are highways, and as such include both the roadway and the sidewalks. Although the abutting owner may have the ultimate and resulting property in the street, his use while it continues to be a public highway is coincident with public use. While excluded from special occupation, he is specially taxed. It is difficult to comprehend how the special taxation for public purposes is to be justified. The particular form of special assessment for benefits has been considered in a prior chapter.

Under the name of taxes, but which may be termed quasi-taxes, are those which, although they in fact add to the public revenue in an irregular way, are imposed for the purpose of regulating or restricting certain employments, or certain property, in the public interest. These mainly concern occupations of a quasi-public char-

acter and which, as such, may be subject to control. Licences, or permission to engage in certain occupations, are of this nature. A tax on dogs is supposed to limit their number, impose additional care of them by their owners, and possibly to supply a special fund for the payment of damages which they may cause. The traffic in liquors, if abused, may have so prominent an effect upon the public health and the public morals, that a restriction or limitation is justified on these grounds. The degree of taxation and its effects, whether beneficial or otherwise as to this traffic, seems not yet to have been settled by experience. The recent extension of the scheme of taxation on inheritances attracts attention to this particular form, and invokes criticism upon its right to be. Its action is not to prohibit bequests, but to divert a portion of each bequest into the treasury of the State, and to this extent to absorb or confiscate it. And similarly as to intestate estates. In a prior chapter, the principle on which descents and bequests of property are sustained, has been discussed. If the reason of a succession tax is to be found in a denial of the abstract right of succession, this particular form of denial is incomplete and inconsistent. If it is based on convenience and ease of application, such considerations are not valid grounds of taxation. Tax on transfers of property is of similar nature and based on similar grounds. If a capitation tax is imposed to acquire a regular revenue, it accords with the principles on which an annual revenue may properly be acquired; but if it is not compulsory and the penalty for its non-payment is a denial of the right of suffrage, there is a false connection established where no just connection exists. Suffrage is not a natural right, but a part of a system of government, not to be discouraged or avoided, nor to be purchased. Customs duties, if not placed in order to obtain revenue, but for the encouragement or creation of certain industries, are special taxes

for specific purposes. They are justifiable, therefore, only when, in obedience to a wise policy, the exigencies of public needs permit the imposition of a burden upon the community to sustain works of paramount necessity, and the necessity needs to be specifically pleaded. Whenever taxes are imposed only for regulative or restrictive ends, they discourage the enjoyment of the particular rights or employments on which they act, and limit their benefits or profits. They are thus liable to come into conflict with established rights, or with a public policy founded on such rights. They are then to be justified specifically by the supreme importance of certain rights overriding others of less consequence.

In these special forms of taxation and those whose design is the acquirement of a regularly recurring revenue, there is a difference, as regards the purpose to be effected, between regulation and revenue. There is a difference also in the regularity and certainty of returns. The object of annual revenue is to supply a want computed in the budget or estimate of fiscal needs, and the ratio of taxation is adjusted to this requirement. A certainty as to the tax fund will alone permit accuracy in this respect. But the purpose of regulative taxation forbids the accurate adjustment of public income to public needs. Uncertainty and inaccuracy of returns do not produce wholesome economic conditions.

Taxation, when completed, is a debt owing to the State, but a debt whose creation is not, like other debts, the act of the debtor. The compulsory method of creation has its counterpart in a summary method of enforcement. The ordinary modes of enforcing payment of debts, through the medium of courts of justice, are designed to afford security against injustice. The proceedings are somewhat dilatory, and in this respect might not be suited to the necessities of the State. Yet some proceedings of the same nature should be required for the

enforcement of payment of taxes. Methods arbitrary and harsh are not in accord with advanced modes of administering justice. Most frequently the whole proceeding from the original assessment of a tax to the final execution, either against the person or against property, is *ex parte*, with but very imperfect means of correction or redress. There is an undue assumption of right on the part of the taxing power, and the initiative of remedy is imposed upon the person taxed. The crowning severity is the proceeding against the property taxed, by the taxing power directly, and the heavy penalties imposed upon redemption. [The tax lien imposes an immediate restriction on property inconsistent with the mode of tax creation. *Vide* Law of State of New York, though limited to one section, providing for absolute foreclosure of tax lien without redemption.] It is perhaps the sole instance in modern Constitutional government when (except in the case of martial law) force is applied directly by the executive without the intervention of the judicial department of the government. There is something in taxation, with its proverbial inevitability, so imperative and, in a sense, arbitrary, vesting a possibility of hardship and abuse, that it needs to be guided and restrained by the most rigid rules of operation in the interest of justice and equal rights.

The above considerations indicate the extreme difficulty of devising a system of taxation, accomplishing its purpose in an economical and equitable manner, with due regard to personal rights and with the least possible disturbance of the ordinary affairs of life. They also point out certain governing principles in modes of taxation that may not with justice be disregarded. Opposing methods are sometimes presented: the one looking only to facility of assessment, certainty of collection, and large pecuniary results; the other guided by considerations of equal obligations, individual competency, and

uniformity of action. When they are in conflict, the former should cede to the latter, excepting in cases of most pressing emergency.

The four topics above treated—of possession of property by the State, of its action in foreign relations, of the application of force, and of taxation—are closely associated with the notion of sovereignty when the State acts as an entity. The distinction here suggested is not important, as in the general meaning of the word every State action is an element of sovereignty. It yet may serve as a classification of functions. The next order of functions is that which concerns the personal rights of citizens in their relations towards one another and towards the State, comprising the establishment of a system of jurisprudence.

In the *Institutes* of Justinian, jurisprudence is defined as "knowledge of things divine and human, or the science of right and wrong." There is a natural tendency to glorify a science or even a new trade which one professes or operates, to exaggerate its importance and its usefulness. Possibly this tendency may explain the eulogistic quality of the definition. But the definition describes also the comprehensiveness of the science of jurisprudence. It covers a large extent of human actions and human rights, and by this quality deserves its place as one department of Political Science, as so described in the scheme of the general science previously set forth. But to a limited degree it also demands attention in a study of State functions and their methods. Perhaps more directly than other departments of State action, jurisprudence has its foundation in ethical principles; and this fact justifies a more limited definition than that of Justinian. As coming within State control, jurisprudence concerns the manifold relations existing between individual members of a community, recognises and defines their existence, and enforces the rights.

There is necessarily in every State a local system of jurisprudence specially defined and limited to a specific State jurisdiction. Here is an actual fact which may be described and may be criticised, and which must be administered according to its principles by those whose duty therein lies, and which must be obeyed by all who are subject to its operation. But criticism of an existing form can only be based on a study of the abstract, illustrated by a study of historical and comparative jurisprudence. The theoretical and the practical must here unite in the function of an ideal system to be in actuality as nearly approached as the conditions of each specific case will permit. Human rights are the foundation of every system. Exact justice is supposed to be the objective point. There may be, however, difficulties in arriving at the desired end. The local, social, and political system of a specific State may be an insuperable impediment. Civilisation is of slow growth. It requires many years to eradicate both opinions and sustained conditions which combat against equal justice. From slavery to but slight class distinction there are many grades, and it may safely be asserted that in no State, however advanced it may be thought to be in all its elements of freedom, can be found conditions permitting absolute justice to the individual. The circumstances of such cases have been previously alluded to. There are local and special forms forbidding an ideal system of jurisprudence; there are other impediments of a general character.

Justice is a word of elastic import. In no social conditions can abstract justice be assured. The denizen of a sparsely settled community will contend for certain rights of action which he would be compelled to abandon if he transferred his abode to a town of greater or less density. Individual rights and the common welfare are here in conflict. The adjustment of their rival claims is a difficult but an unavoidable problem of governmental

science. We here approach the idea of general welfare, described by the word utilitarianism or the phrase "greatest happiness of the greatest number." Words and phrases, if not explicit or well chosen, are liable to create confusion and promote controversy. Yet one theory is certain, that no system of jurisprudence, and in fact no governmental organisation, can exist without a recognition of the fact that in many instances individual right must cede to the general welfare. In fixing the degree of the cession lies the question of the beneficence or the maleficence of a jurisprudential system. No fixed rule of action can be stated; but the guiding idea should be that individual rights must yield only when such yielding is essential to the general welfare,—when, in fact, the individual as a component part of society is benefited by such cession. These are the difficulties against which any system of laws has to contend. They must be met in each case as the circumstances of each case will permit.

There are two constant features of jurisprudence: the declaratory, wherein the personal rights which the State undertakes to enforce are either distinctly stated or their existence is assumed to be evidenced by custom and long practice; and the directory, wherein such rights are assured. This assurance almost always takes the form of punishing an infraction of rights. It rarely happens that a more direct form of assurance is practicable.

Systems of jurisprudence, like systems of government, are evolutionary. They are associated with the beginning of a State, follow its course, and are modified by the character of the government and the character of the people. They become rooted in the habits of the people. It follows, then, that every attempt to improve or to reconstruct must take cognisance of this fact. The feasible is to be regarded as well as the right. Theoretically at least, the State is the creator of its particular

system of law; for, although as a fact a complete system has never been a distinct creation even where formal codes are found, the power of modification and of enforcement exists.

The functions of the State, then, in reference to jurisprudence, are to declare the principles of the rights which are within its duty to protect, and to create and operate the most efficient method for the maintenance of rights and the redress of wrongs. The grounds upon which rights are based have been abundantly described in previous pages. The practical operation of State functions as to jurisprudence remains to be considered. In declaring the general rights appertaining to humanity which come within the guardant power of the State, and such supplemental or artificial rights as add to the welfare of a community, care should be had that these two classes be not in conflict. Herein lies the opportunity for a scientific as opposed to an empirical or haphazard creation of system. In the enforcement of rights and the punishment of offences, the most common of State functions as to jurisprudence, the fact to be considered is the most complete possible accomplishment of purpose with the least possible disturbance of personal comfort.

In all systems is found the division, as to offences demanding correction, of what are termed civil and criminal. These classes differ in character and mode of treatment. What are their distinctive characteristics? The distinction is not easily explained by a phrase. The statement of Blackstone that "civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs or crimes and misdemeanors are a breach and violation of the public rights and duties due to the whole community considered as a community in its social aggregate capacity," serves only to state a distinction without explaining it. The difference in the mode of punishment of

the two classes of offences is no more explicit as an explanation.

Many points of difference are discernible between what are termed crimes and so-called civil injuries, between public and private offences; but no one single point of distinction can be found of such prominence as to justify a differentiation. We must observe the qualities which characterise the two classes respectively. It may be observed that crimes are offences which are cognisable among rude peoples, offences usually of a violent character and directed against the person or property. Such are usually embraced in the religious code of early peoples, and are there designated as sinful. Civil injuries are in most cases such as affect the more complicated relations which exist in advanced communities. Both civil and criminal injuries are such as affect inherent rights; but a distinction may be found in that criminal injuries are such as cannot ordinarily be guarded against by the individual, and civil injuries act upon conditions which the individual has created and against which, in a measure, certain precautions may be taken and certain safeguards erected. While the distinction is not, in itself, closely drawn, an arbitrary distinction may be established. In criminal injuries the State has the initiation in correction and prosecution; in civil injuries the initiation and prosecution are left to the person injured.

Jurisprudence is a department of Political Science. It covers an immense field, and deserves thorough and scientific treatment both as to the principles which it involves and as to the methods of practical operation. It is that branch to which popular attention is the most directed. Few people know or have need to know much about the science of Government, of international law or of political economy; but in the daily transactions of life, "the law" constantly obtrudes itself and demands acquaintance. The term "the law" as generally under-

stood is limited to the rules which affect the ordinary business of life, and many so-termed lawyers have their knowledge confined within this limited sphere. This is, of course, but empirical knowledge. It takes things as found, and is dependent on forms and statutes. Contrasted with this is that general and comparative jurisprudence which forms one of the most interesting as well as the most useful branches of Political Science.

An undoubted function of the State is the care of the moral and physical welfare of its people. The moral welfare is effected by education. The chief effort of humanity in all ages and in all forms of civilisation is *to know*. The effort at knowledge is an uphill struggle, and it is remarkable that the knowledge which is essential to the progress and welfare of the human race is acquired by the slowest degrees and by the continuous labour of many generations. In the meantime, misery, suffering, loss of life, are the penalties of ignorance. Year after year, generation after generation, century after century, are witnessed diseases which torture humanity and abridge life, until the means are discovered whereby the evil may be abated. In a similar way the act of protecting against the effects of natural powers is learned, and only partly learned, by years of effort. The constant struggle after knowledge to guard or to improve humanity is constantly going on with infinitely slow results. This picture, drawn on a grand scale, is reproduced in all the smaller affairs of life. As knowledge advances, so do conditions improve, and equally are the problems of life simplified. With the advance of knowledge the people of a State find their moral and material justice improved, and the difficulties of government are lessened. It has been the fashion at times to deny the advantages of knowledge as spread among a people. To do this is to deny all the teachings of history, to misjudge the forces which have been acting for the advance of mankind.

With these truths thus set forth it appears that it is a State function to further or to compel as far as the needs of the case demand, the education of the people. The advantages of education appear in many ways: in the economic sense, in the greatest utility of labour by the application of superior intelligence; in a moral sense, in the cultivation of good habits; in a political sense, in a more intelligent comprehension of political duties. The degree of intelligence furthered by education is politically valued directly as the popular participation in political duties. Granting these truths, it is a State duty to further and possibly to compel popular education. The compulsory feature is to be governed by the extent to which the State demands for education go—that is, what degree of education is thought necessary. This question is not easily answered. Much depends on both the character of a people and the character of the government imposed on them. Primarily the object of popular education is to qualify the people for the ordinary duties of life and of citizenship, but not to meet the requirements of scientific knowledge. The latter may possibly be a wise enlargement of State functions, but is not ordinarily imperative.

A great deal has been written and said about the injurious effects of over-education, alleging that its tendency is to make one dissatisfied with his lot and neglectful of duty because always aspiring to some other. It is easy to conceive that such effect might be produced, and that such consequences should be avoided. In enlarged communities there are occupations of all grades and relative importance, and it is the interest of the community that each vocation should be properly and thoroughly performed, whatever its comparative importance. It follows thence that what tends to diminish excellence in any vocation is unwise and misplaced. This difficulty it seems may be overcome by a graded system of education. The

lowest grade, including by far the largest class of youth, is to be limited to what may be termed the lower branches of learning. This phrase is necessarily indefinite; yet practice and experience will serve to fix its bounds. Within this grade lies almost the sole duty of the State as respects education, and beyond this grade compulsory education should not extend. The educational system of a State might stop here, as having fulfilled its most general purpose and thus far alone justifying taxation for such ends. It then becomes a question whether or not a promotion of the higher branches of knowledge is of sufficient importance to permit the assistance of the State. The extreme advantage of higher scientific knowledge is well known, and it is also well known that many minds capable of high culture must remain undeveloped for need of opportunity. A second grade may be established granting opportunity for a superior education to those who have shown an aptitude and a disposition for such improvement. Still other grades may be established, with diminishing numbers of students. The passage from one grade to a superior one should be permitted only upon a test of fitness for advancement. In this manner it seems that the ordinary purposes of education of a people may be attained, and at the same time the State may avail itself of a higher order of ability among its people.

Education does not stop with the establishment of schools of the ordinary kind. Man's nature is varied, and needs development in many directions. The establishment of museums as an adjunct to the school, and the means of cultivating the æsthetic nature by objects of art and by music, may be within the list of State functions. While the variety of sects renders direct religious education impracticable, it is an unquestionable State duty to permit the undisturbed performance of religious rites. This duty, of course, does not protect the

so-called religious rites that are inconsistent with defined morality. The function of the State as to education cannot be stated without some latitude. Like all political subjects, the general lines of progress alone can be pointed out, their limitations being dependent on the circumstances of each case.

The physical as well as the moral welfare of a people comes within State supervision. It is a fact of human nature that the individual is not only liable to neglect his own physical welfare, but that such neglect and a disregard of the welfare of his neighbour tend to the injury of a community. He needs to be protected not only against himself, but against the harm occasioned by the selfish interests of his fellow men. Again, in the complicated systems of modern society it happens constantly that the power to control others necessarily exists, and that there is always a sufficiency of motives for the abuse of this power. Hence again the necessity of control by a superior power. It is one of the most deplorable traits of humanity, the disposition to impose upon and to maltreat those over whom the power to do such acts exists. Both man and the lower animals are subject to such imposition. It is, then, one of the functions of the State to protect the young, the infirm, and the powerless, and to guard against injuries to the community from carelessness, greed, or improvidence. Sanitation and charities are State functions. It is necessary to prevent the spread of disease, to insist on such care of premises as to prevent injury to the neighbourhood. The age at which children may labour, the hours of labour generally, the care of the aged and infirm, the care of the injured, the prohibition of excessive labour prompted by greed or avarice,—these all are objects of State direction, and they may be summed up under the heads of Sanitation and Charity. Wherever preventive measures are possible they should be used. Some of the most serious disasters

entailed on the human race come from unwise and imprudent marriages. As to such cases, preventive measures are difficult of application, but wherever justifiable, should be enforced. This class of State functions is the one in which the State often fails either by neglect or incompleteness. In many cases these are left to the care of private action or private supervision over State action. Notable are the cases of protection to children or to the lower animals. In many cases charities may be left to private action, but it is in reality doing a State work, and if permitted, should be given the necessary authority in the prosecution of its work. Nevertheless, in all such, the fact of their being a proper State function should not be disregarded.

The concluding topics of the department of functions are such as relate to the material welfare of the people. It is a subject on which the action of the State should be circumstantial, its purpose being not to modify or control private industries, but to assist and regulate them in the interest of the whole community. As to these material matters, one of the chief functions of the State is the regulation of the finances. The legitimate meaning of finance is the government control of monetary affairs. The creation of a currency or a circulating medium is an absolute and an arbitrary governmental action. Theoretically it is within its power to establish any form of currency at its pleasure. It is the government stamp and the government decree that make a currency. Its use is compulsory, when imbued with the legal-tender quality. Stamped paper may be the only currency within a State, objectionable though it be, in that it is within the power of government to alter its quantity and thus destroy all stability, with the additional fault that its acceptance cannot be compelled in any other State. Practically, then, this unlimitable power does not exist. The stability necessary for a just liquidation of debts and

satisfaction of contracts can only be had when the material of currency has a value in itself dependent like other things on the cost of production, and the intrinsic value makes it exchangeable between nations. The fitness of gold and silver for this purpose has created international unanimity as to their use. The apparent choice, then, is by circumstances restricted to one or both of these metals. Whether one or both shall be selected has for a long time excited and is still exciting much heated controversy. Upon a much discussed question there should be some diffidence in the expression of opinion. Yet the distinct advantage of a single standard of value seems obvious. All contracts and all business transactions are ultimately measured by, and expressed in, the fixed currency of the country. The permanency and fixedness of value, then, of this measure is of prime importance, a necessity of all measures. The precious metals, like all other things, have value dependent on their plentifulnesss, on the relative exertion needed to fit them for use, in fact, as universally expressed, on the cost of their production. This value will vary from time to time, but in the case of each metal the variation will be slow, change can be predicted, and agreements based on such values adjusted to the new conditions. Both gold and silver being liable to such changes, the relative variation will be much greater. For it is a fact, the operation of which cannot be directed, that where a choice is permissible an obligation will always be discharged by tender of that which has the least value. The existence of an alternating standard thus diminishes the stability or fixedness of value which is so important an element in the medium of exchange.

If, then, a single standard is deemed wise, the choice will naturally be governed by fitness, and that is the best fitted for this purpose which has the greatest intrinsic value and is the least liable to fluctuation. The choice

will also be modified by the most general acceptance by highly civilised nations. It does not follow that this principle restricts the use of one metal only. The feature of singleness applies to the standard, not to the material. For smaller transactions, metal of less value is suitable, but it should always be redeemable in that of standard value. After the inception, the proportionably expressed values will be regulated in accordance with actual relative values. Variation to an important extent will make necessary a new adjustment; but when the redeemable feature exists, the expense of such adjustment will be borne by the State—that is, by the whole community.

A suitable material of currency being selected, it is of the financial function to preserve its integrity, to fix a suitable unit of values, to adjust the coinage to such proportions as best suit the purpose of exchange. Inasmuch as the intercourse between nations is now very extensive, in the establishment of a currency it is a wise policy to regard the needs of international exchange. Naturally the leading commercial nations will be a guide to others. There is not, nor ever has been, an adjustment of international systems of currency as commercial interests demand. It is of importance that agreement should be had as to the selection of a metallic coinage. It is not important that the systems should coincide. Yet it is desirable that nations should agree upon such units of value as bear a simple ratio to one another, for the ease and safety of commercial exchanges.

While metallic currency is an essential, convenience demands that some form of paper money should be in use. Strictly, this is not money, only a promise to pay money, and its value lies in the certainty of redemption. It seems proper that this want should be supplied by a government issue of obligations in form convenient for exchange; but an objection lies in the temptation to

over-issue. The power exists, and there is no restraining authority. The liability to abuse is an insuperable objection. It is, however, a State duty to legitimise the issue of paper money by authorised individuals or institutions, and to exact an absolute safeguard against abuse of the privilege, and a prompt and complete redemption when demanded.

The above seem to be the chief functions of the State in the matter of finance. Nowhere is it more important to strictly define the duties than in financial affairs. Any extension of this function tends in the direction of mischief. The effort should always be to simplify its action.

A very important State function is that which regulates commerce on the high seas. The sea being free to all and not under control of any one nation, every nation makes rules for the conduct of its own people, subject of course to the general rules of international law or to the force of treaties and conventions. Naturally, then, foreign commerce being of international character, there is thereon a broad field for governmental action.

To a less extent, State action affects internal commerce. Lines of travel passing through many local jurisdictions require as to such commerce the application of general rules. Transportation naturally, then, forms a subject of regulation by the State.

The word "industries" is now used to designate the various occupations of a people, but specially such as require the employment of a number of persons. The present time is witnessing changing methods in their operations, and coincidentally changes in State duties regarding them. The movement towards consolidation revives socialism, demanding an increase in State functions. The fact has been sufficiently dwelt upon that in a social as well as physical point of view the operation of affairs is beyond the control of outside influence, and that such control is as likely to work injury as good.

The true functions of the State as to industries are to protect against interference and to avoid unequal and unjust assistance, to neither injure nor stimulate. The varied industries of a country form its material greatness. The kinds are dependent on the physical character of a country; their quality, on the mode of operation; their complete success, on their freedom in operation. The regulation of industries is only an exceptional duty justified by circumstances. Certain national exigencies may demand that the natural progress of industrial affairs be diverted from its ordinary course. To supply a want or to provide for future needs, the creation or stimulation of certain industries which without assistance could not exist may be a judicious act. Sufficient reason may be given why the imposition of a tax for such purpose is expedient.

The simplest method of endowing an industry where the difference between the cost of a product and its market price is not sufficient to afford a profit to the producer, is by bounty or subsidy. This is an exact method, and the needed tax can be determined with a fair degree of accuracy. The other method is by means of tariff to prohibit or discourage the importation of a competing product, thus compelling the purchase of the domestic product. This may be termed specific protection. The fostering of special industries for special purposes may be a mark of wise statesmanship. The special protection differs in a marked degree from general protection, the theory of which is that a country should be self-producing as to all its requirements excepting as forbidden by geographical conditions. Upon this principle every industry is entitled to protection. A tariff may be absolutely prohibitive, thus giving complete protection, or it may enhance the price of an imported article so that but few may be able to purchase even though such purchase might be a wise economy. Here, then, the poorer classes

bear the burden of supporting that special industry, and protection is incomplete. The effect of protection is to impose a burden on the community, measured by the enhanced price of everything affected by the tariff. This is sometimes described as a tax. But a tax is properly a contribution to government support, and this imposition never reaches the government treasury—it is a direct contribution to the profits of the producer. That portion alone which adds to the State revenue is where the imperfection of the tariff permits some purchase of foreign product; to which extent, then, protection fails in its purpose. The enforced contribution levied for the support of an industry which without such support could not be, is a false economy. Besides the general theory, it is alleged that protection increases the home market for domestic products. If this be effected by importation of labourers in the stimulated industries, it conflicts with another theory, in that it impairs the condition of native labourers. The natural effect of tariff is to limit the foreign market; for trade exists only by reciprocity. A peculiar feature of the protective idea is that the burden imposed by this measure cannot be ascertained. Otherwise it is possible that people might be appalled by the magnitude of the burden imposed by a false economy.

Thus far the nature of the functions to be performed by the State has been considered. For a detailed study of the methods of operation, recourse must be had: as to personal relations, to jurisprudence; as to material property, to political economy.

## CHAPTER V

### CONSTITUTIONS—CONSTRUCTIVE

IN a political sense, the word "Constitution" indicates a system of government. As the human constitution indicates the physical and mental system of man in general, or the specific difference which denotes the individual man, in a similar way "political Constitution" describes governmental system in general, or the particular system which attaches to any one State in question. It is not essential to the meaning of the term that there should have been a distinct creation of the system by a direct and complete act; still less is its meaning restricted to a defining and descriptive instrument. Most present States are the product of evolution, of slow and continuous growth, and even where a distinctly formulated system appears, it is mainly a reorganisation, or an adaptation of existing material. The political condition of a State, at any period of its history, may be described as its Constitution. Written instruments, either as a whole or as a series of records, are merely the evidences of Constitutional being. The ordinary distinctive words of written and unwritten Constitutions are not well chosen to express the difference between a Constitution expressed by a formal and complete instrument, and one whose existence is evidenced by a series of legislative acts or executive concessions; and they utterly fail to distinguish Constitutional effects which are the sole product of national creations and sentiments. Such effects are to be found in every State, influencing Constitutional

provisions and State actions. No government, however nearly it approaches to absolutism, can be free from the power of certain forces. There are prescriptive rights which no ruler dares infringe. The genius of a people, a fondness for old forms and customs, and a respect for existing laws form the real unwritten Constitution, and impress on every government something of Constitutionality. There are natural social laws always acting among every people, which Political Science cannot afford to disregard. The universality and force of customs are thus expressed by Lubbock: "No savage is free; all over the world his daily life is regulated by a complicated and apparently most inconvenient set of customs as forcible as laws." Thus the real unwritten Constitutions are as powerful as the written, and any formal provision which fails to be in harmony with them will be in vain, or will meet with strong opposition.

Still the distinctive terms "written" and "unwritten," the one meaning a distinctly formulated instrument, or the system of which it is the exponent, and the other a system of successive creation, have by use acquired a sanction which must be regarded. Using the words in this sense, then, a comparison of the two forms will serve best to illustrate a signification of the terms, lying far back of the meaning already described, and going to the very essence of the Constitutional idea. It may be called Constitutional force, something superior to usual State action, a force which alone gives vigour to Constitutions of the unwritten type. That an organised State power should modify and limit itself in the interests of the people seems incredible, if we were not obliged to recognise the fact that there is somewhere a restricting or a compelling force, a power behind the throne. This power, the acknowledgment of which has caused confused ideas of sovereignty, is created by custom, by sentiment, by the peculiar attributes and characteristics of a people.

It is not an organised force to which appeal may be made either to enforce a duty or to rectify an evil. It is too vague to be termed a sovereign power. The elements of the unwritten Constitution in an advanced nation are found in a series of laws enacted from time to time, usually impelled by the force of circumstances, and intended to resent oppression, to correct abuse, or to guard against future misgovernment. They must in themselves express sound principles of human right in order to possess permanence and a sanctity superior to ordinary enactments. Additional prestige sometimes attaches to such provisions from the circumstances under which they have been effected, and by a certain dramatic interest belonging to events of such moment. The meeting of the Barons and the King at Runnymede has to many minds an impressive effect, wanting to the mere announcement of rights and principles of justice which *Magna Charta* affords. But the true stability of such enactments lies in their intrinsic merit, and in appreciation of their merit in the minds of the people. Herein is their real strength. Of course no nation can exist without a general appreciation of right. If all are corrupt, no good government can exist, and Constitutions must yield. There are liable to be, in the history of nations, periods when principles of order and justice seem to lose force both among the people and the administrators of government. At such times a legislative body acting within its constituted authority may overturn prior beneficent acts. Against such faults unwritten Constitutions afford no protection. They lack a systematic form to which appeal may be made, a constituted method of correction and its protective influence.

The Constitutional landmarks in the history of a nation are of two kinds. History from the earliest times records numerous instances of forcible protest by the people, or more frequently by certain classes of the people, against

governmental abuse. The effect of such movements is an enforced concession by the ruling power, and usually a lasting prohibition against transgression of just rights, or a firm precedent for future legal action. But all such movements are of a revolutionary character. They are abnormal and uncertain, and delay action until the increasing severity of the disorder demands a remedy of equal severity. They are liable also to create temporary disorders of great magnitude. They still have usually served a good purpose in accentuating the principle that the welfare of the people is the true end of government, and thus making a distinct advance in political ideas. The other method of establishing Constitutional forms proceeds through the ordinary governmental channels, and is the action of the accredited representatives. This method is more regular and orderly. Its action, though, is mostly prompted by emergency and external pressure, and in this respect resembles the other mode in its uncertainty of action and irregularity of method, though to a less degree.

The question naturally arises wherein lies the stability and the permanence of Constitutional provisions thus created. There is no legal sanction giving them efficacy greater than ordinary governmental acts, no security against simple repeal. This fact points out defects, the want of legal hold upon the system, and the unscientific nature of creation. A codification of what may be termed Constitutional laws might form a written Constitution, and it would probably reveal many uncertainties and many defects and a want of symmetry and completeness of purpose. At the same time one might expect to find, as an effect of gradual growth, a certain adaptation to national characteristics. The element of permanence must be sought in the conservative character of a people, a national disposition to retain the old, and an indifference to the new and untried. This same disposition,

carried to an extreme, gives Constitutional features to an otherwise absolute rule. But it is an obstinate and unreasoning disposition, tempering absolutism, but, with equal force, resisting reform. The real unwritten Constitution of absolute monarchy has a tenacity greater than the flexible Constitutions of liberal governments.

Probably a written or thoroughly formulated Constitution presents the best exposition of governmental principles. It should contain certain important elements not to be found in other systems. It should be more complete, more scientific, with a better security for the peaceable solution of matters of dispute and adaptation to future emergencies. Every formulated Constitution of any validity has some of the elements of the unwritten. There must have been something of gradual growth, a recognition of national customs, and frequently an adoption of pre-existing institutions. One cannot predict the efficacy of absolutely new designs. The test of time and fitness is essential to the perfection of instruments. While a special Constitution must be adapted to a special people, the theory of Constitutional government may be studied and a Constitutional type be developed.

The purpose of this work has been to point out certain rights and duties derived from the observed nature of man, to regard as the object of government the maintenance of these rights, to test all governmental systems and all governmental functions by their efficiency in accomplishing these results. A written Constitution, then, attempts to formulate certain principles of right derived from reasoning and from the experience afforded by the history of successful governments and of advanced civilisations, and to establish a form of government to accomplish this purpose; and that form is the most successful which best attains its ends by the means which the conditions of each case permit. In the formal part

of a Constitution, a matter of extreme importance is the extent to which it shall go either in the permission or the restriction of legislative action.

A Constitution must have a degree of rigidity, but also the power of change if change should become necessary; but rigidity is not a feature of the legislative department of government. If the Constitution should be too comprehensive and prescribe too strictly legislative functions, the legislative body, lacking the necessary elasticity, would be inefficient. If the Constitution fails to impose the necessary checks upon legislation, the Constitution itself is inefficient. The degree of rigidity which appertains respectively to a Constitution and to a legislature is a matter often disregarded. The apparent paradox, that one of the most valuable features of a Constitution is its power of amendment, is nevertheless a truth. Without that power, the instrument might become obsolete and might fail of purpose. This power should be most carefully guarded, and changes should be effected with the same formality and caution as in the original creation, or the restrictive force will be wanting. But a legislative body should be more yielding and capable of adjusting its action to present needs. It deals not so directly with universal truths and general rights, but largely with the every-day affairs of life, which are less constant. When the Constitution limits the elasticity of the legislature, the two may operate in perfect harmony. In the formation of Constitutions, as in all departments of Political Science, there are the two elements of the theoretical and the practical, the purpose to determine what is to be done and to devise the best means of doing it. Of these two parts, the one is the announcement of political principles to be closely adhered to, and the other is the organisation of a governmental system to sustain those principles. The work is one demanding a freedom from ties and prejudice, and of sufficient importance to engage

the best intelligence within the department of the moral sciences.

Viewing Constitutions only as a means of governmental organisation, treating the means and the end as one, and the term "Constitution" and the State which it creates and of which it is the evidence as of equal significance, certain instructive lessons are in evidence. It appears that Constitutions are never entirely new. They are engrafted on existing systems and applied to existing conditions. The nearest approach to absolutely new creations are to be found in the partly autonomous colonial governments, or as the outcome of successful revolutions, wherein the old order ceases and the new order emerges, distinct and hostile to prior existences. But colonies do not escape the influences of the customs, habits, and traditions of the parent country; and revolutions are a protest against distinct abuses more often than a dissatisfaction with a system. The newly constituted government is mostly a modification of a previous one necessarily governed by the nature of the people whom it is designed to affect. In one sense, however, every operative Constitution is new; for whatever views may be had of the legitimacy of its origin, it is a destruction of all prior organisations, and absolute while it continues. An historical presentation of the making of various Constitutions exhibits degrees of authority in the creation of governments, and illustrates theories as to how far the assent or approval of a people should be the basis of governmental organisation. It may be asserted without a doubt of its truth, that in no case is the organisation of a system the approved act of a whole people, nor does its continuance receive universal assent. At every time there will be some dissatisfied, and some even disaffected. The degree to which popular action, directly or indirectly, enters into the creation of the State, marks its character and that of the people composing it.

Recent history furnishes abundant illustration; for the last one hundred years has been an era of Constitution-making. The history of France since 1789 supplies instances of varied character in the beginnings of Constitutional creations. It seems fair to term the National Assembly or the Constitutional Assembly a legitimate organisation, in spite of its somewhat irregular formation. The Third Estate, when summoned as a component part of the States-General, violated precedent and took a somewhat revolutionary movement in demanding that the three Estates should act as one body, where action should be determined by the majority of individual votes. The assent finally accorded to this demand was a forced assent. But the demand was also enforced by conditions which, but for this instance, would render the action of the people's representatives nugatory. The National Assembly, emerging from the States-General whose three Estates enabled the union of any two to override the third, may then be considered the legal representative body in the French State. Yet it did not receive the sanction of the whole community, the nobility and the clergy assenting under protest. Such was the body which devised a Constitution of a monarchy with a legislative assembly. The Constitution thus formed was tentative, its success depending on the temper of a people under new and untried conditions. That movement which began with a show of order and a measure of legitimacy, soon changed its character. The fear of an external destructive force, and the disorders of a newly enfranchised people developed a temper fatal to conservatism. The Convention, if as thoroughly representative as the Constitutional Assembly, was not as truly representative of the better element of the nation. During the existence of the Convention and while the Reign of Terror held its sway, the general opinion of the nation, as opposing movements testified, never justified

the acts, nor sanctioned the existence, of a body which inaugurated a new Constitution under the Directory. From this point militarism supervened, created the Consulate, and finally culminated in the military despotism of the Empire. But militarism is essentially a rule of force, and its acts are not representative acts. The restoration of the Bourbon monarchy by foreign powers, with its ancient absolutism, could not be termed a Constitutional proceeding, or one in which the French people took a part. The experience of preceding years had developed new ideas respecting the prominence of the people by their representatives in political movements, and the Constitution of a restricted monarchy in 1830 and that of a republic in 1848 were effected by a more generally popular action. The Republic inaugurated in 1871 arose from chaotic conditions. The apparent general popularity of the movement was probably the product of imperative foreign demands. The present Constitution of 1875, with subsequent amendments, arising from a Republic of four years' standing, has in it more elements of general assent and of mature consideration, than prior governmental forms. For this reason a greater permanence and a more complete adaptation to national conditions might reasonably be expected.

Reverting to a prior Constitutional epoch—Constitutional not in the sense of making a new governmental system, but in the announcement of advanced governmental principles of the highest moment,—the Convention of 1688 in England affords an inspiring study and a political illustration. Its action was revolutionary in that it overturned ancient methods, established a new theory of succession and of monarchical rights, destroyed certain political superstitions, and ended a long contest between the rights of kings and the rights of the nation by making sovereignty not personal but national. This action was probably more really a making of a Constitution than

any other political event in English history. It marked an advance in Political Science, whose effects are tardily perceived in the political history of other peoples. Within this movement are of course to be included the Declaration of Rights, subsequently confirmed by the Bill of Rights. But when the authority by which these acts were consummated is considered, it seems not to have been conceded with unanimity. The political and religious contentions which had been waged during many years preceding the assembling of the Convention had strengthened parties hostile and irreconcilable to the extent that they could not co-operate in work of the kind that the Convention had to perform. In the Convention itself, there were several different parties separated by sentiment, by opinion, and by training. Agreement resulting in action must have been reached partly by conviction, partly by submission or compromise as the only means of attaining a common end. If we consider the beneficent results achieved by this memorable assembly, it would seem that its action should have received the commendation of the whole nation. Yet it took several generations to subdue the force of political and religious bigotry and to produce an accord of sentiment.

We have been accustomed to think that the present government of The United States under the Constitution which became operative in 1789 had a larger share of popular approval than is found in most governmental Constitutions. The sentiments which existed at that time are best explained by the records of a few immediately preceding years. The feeling of hostility, which during the Revolution was equally shared by the two opposing factions, had the intensity peculiar to such troublous times. After the lapse of a hundred years we can impartially appreciate the contrary feelings then existent. By the light of subsequent events and with the information which we now have as to the temper of the people,

we are satisfied that the difficulties between the parent land and the Colonies could have had no other outcome than separation. And we are equally convinced that the stable union of the States could only be reached by their being welded into a nation. We may believe that there were persons who, not illumined by subsequent events, could hold an honest conviction that revolution and separation were not for the best interests of the Colonies. The civil war has taught us also that loyalty to existing conditions is not necessarily a reproach. The difference of feeling intensified by a period of war did not terminate with the war. In the Constitutional Convention opposite political views made themselves apparent, and some sectional differences were adjusted by compromise. The writers of the *Federalist* laboured not only in explanation, but in conciliation of hostile opinions. Nevertheless, the due deliberation accorded to all details of Constitutional provisions, the time allowed for confirmation, and the methods of confirmation gave to the Constitution of The United States more of general consent than has been originally accorded to most governmental systems.

This historical retrospect, the test of political theories, serves to confirm the conclusions which Political Science would deduce from the known nature of man and the essential characteristics of political institutions. These conclusions are: That neither in the organising of a State nor in any marked change of State policy is unanimous consent to be expected either on the part of the whole community, or on the part of that portion of the community which by the force of circumstances or position of authority is the organising body. Facts display varied numerical differences from the work of a small faction to the endorsement of a plebiscite. This suggests several important political considerations,—among others, what is the legitimacy of State organisation? Modern Political

Science will deserve very little consideration if it cannot supply a better definition of that term than the one which in the past has served to justify civil war or foreign intervention. The most beneficent act of what we may call the extremely conservative English revolution of 1688 was that which, in the minds of all but some fanatical adherents, destroyed the idea of the dynastic right to rule, and substituted another idea, that a Constitutional provision was the sole title of a ruler, and his term of office co-extensive with the obligation to administer office for the welfare of the people. In fact, the answer to the above question must be somewhat vague:—negative, in that it ignores the erroneous idea of legitimacy just alluded to; and positive only as to the spirit which should govern all governmental creations. One cannot describe with accuracy what should be the extent or the quality of a Constitutional force. History shows great variety in this respect, and it further shows that the Constitutional force and the destructive force are rarely coincident. In this fact we must recognise a customary course of events; which naturally would not lead to desirable results. A movement to destroy in whole or in part an existing order, to be intelligent, should propose an improved creation or a judicious modification. But many revolutionary actions are not intelligent in this sense: they are the effect of intense dissatisfaction with the things that are, pushed beyond the limits of submission. This is the nature of popular revolutions. They are merely destructive and not creative. They represent the inevitable results of misrule. But theories of amelioration deserve consideration, especially when they become the unit of organisation. Socialism merits attention because, besides being a protest against existing things, it proposes an alternative; but anarchism, which, although probably another form of the same protest, demands the abolition of all rule, can occupy no more conspicuous place in a

treatise on government than did the famous laconic chapter on snakes in a certain history of Ireland. In truth, new Constitutions must be judged by their fruits. Rightly or wrongly, the destruction of that which preceded them is an accomplished fact. The new must submit to the same test as the old. It should not be imperilled by a blind unreasoning adherence to a former régime. Misplaced loyalty to a deposed system has disfigured many a page of history.

Another conclusion derived from the historical review is that Constitutions which are in the main modifications of former systems have a greater probability of successful operation than entirely new adaptations. The United States Constitution serves as an illustration of this theory. Although very advanced principles of government were formulated by that instrument, they were not the product of the Constitutional movement only. The history of preceding years had paved the way for their adoption. The disputes which resulted in separation were in reality a contest between the old and the new political ideas; they were a protest against Colonial administration in the sole interest of the parent country; finally, they were a demand for just extension of the representative system. It is safe to say that if the present political ideas had been advanced by a century and a quarter the chief element of discontent would have been lacking. During this period there were exceptional advantages for freer experiment in political theories. The different Colonies emerging into States, alike in the main, but with special and local differences, were so many experimental studies in government and in popular needs. The eight years of the Confederation demonstrated negatively the wants of a solidified system. Fortunately, too, at this time there was the talent to observe and profit by their experiences. Thus The United States Constitution was not the mere speculation of political philosophers: it

was Political Science enlightened and instructed by experience.

The third conclusion derived from the historical survey is that every Constitution should contain within itself the power of modification. "The law of the Medes and Persians which altereth not" figures a rigidity of system which must either prevent progress or destroy the State. The changes which time and circumstance make imperative are to be effected by peaceful means or by violent means. Without the power of adaptation, a Constitution is, in time, self-destructive.

The general nature of Constitutions, apart from their specific differences, gives a study in the methods of effecting the true purposes of government, and of furnishing a security against infringement of human rights. These two topics have been treated in detail as a preliminary to the means of enforcing them. These are the true Constitutional attributes. Every Constitution, to accord with this view of its purpose, has two contradictory elements—the restrictive and the creative. The restrictive limits governmental action; the creative and formative is the element of positive action. This last-named characteristic feature is the subject of present attention. It may be concurrently illustrated by the study of Constitutional forms showing national differences in that which has a common purpose. The differentiation of governmental functions into the legislative, the judicial, and the executive, is an inherent one, and indicates a separation into departments corresponding with the functional peculiarities. As a fact also, this separation is a common one, although for corrective purposes a participation of action is sometimes permitted. But whatever the adjustment found in special systems, each department may be primarily considered as a special department and the wisdom of co-operation be considered subsequently.

The inherent characteristics of legislative action serve

to indicate the composition of a body to which they are to be intrusted. One marked feature of the legislative functions is its comprehensiveness. It is the creator and regulator of almost all governmental measures. Its relation to all the varied interests of the community imposes upon it a more popular character than attaches to the other governmental departments. This comprehensiveness of function imposes a varied character upon a legislative body. As it deals with the highest interests of the people, a high quality of political intelligence is needed. As it is charged with the care of varied interests, special and local needs are to be represented by a detailed knowledge of their requirements. Herein are presented two distinct qualifications demanded of those who shall administer the legislative duties of a government. The degree in which the popular elements enter into the legislative body will depend upon the extension of legislative functions. It is perhaps a new provision to organise smaller governmental bodies within certain geographical bounds, giving them direction over purely local matters as far as it is possible to separate these from general interests, but of course in due subordination to the central laws. By this means the legislative body of the State, relieved of the consideration of local and sectional interests, assumes the higher attitude of guardianship of national interests. Still, the distinctive character in legislative duties must in a measure exist, and must be provided for.

The common practice of meeting this requirement is by a division of the legislative body into two chambers, distinguished from one another by the qualification of the members, by the term of office, by difference in authority, and by distinction in mode of appointment or election. The political principles may be taken as settled by the concurrence of opinion and practice, so as to be removed from the field of discussion, that each of the three

principal departments of government should be in the main distinct, and that the legislative body should be composed of two houses distinguished by a variance in quality of composition. Finding this agreement in the practice of all the prominent modern States, much instruction is to be obtained by a comparative study of the methods by which these principles have been practically expounded. All the principal States of Europe excepting Russia and Turkey—and they are all (but France and Switzerland) monarchies—have in their Constitutional systems a distinct legislative body composed of two separate houses. Greece and some of the smaller States comprised within the German Empire have a single legislative body. The same Constitution is found in the States of North and South America, all of them being republics, unless Canada is to be excluded from the list. This shows the tendency of modern times to an assimilation of governmental forms, and to uniformity of conviction upon the principles of governmental science. There is to be observed, too, in all these instances, a distinction in the composition of the two houses, giving to the one a more popular representation and to the other more of permanency and a higher grade of qualification. And it is instructive to study the method by which this distinction is applied.

The principles which are found to lie at the base of legislative construction are these: the qualification of members, the mode of their appointment or election, the term of office, the qualification of elections, periodicity or continuity of the legislative term. These are essential features of the legislative body. The degree in which each of them enters into its construction marks the differential Constitutions of States.

For purposes of comparison it is convenient to divide States into two groups, and the plan of division is readily at hand. Among Constitutional States are found Mon-

archies and Republics, tending to approach one another in obedience to the laws of modern civilisation, but still distinguished by conditions which are the product of historical causes. It is a gratifying spectacle to see States of recent growth arising from colonial existences or emerging from successful revolutions by which the old order has been distinctly set aside, and States of ancient lineage whose present political condition is the result of gradual development, agreeing so closely in the essential principles of government. It shows that a science of politics not only exists, but that its force is appreciable and its influence extended. It gives reason to believe that States which have hitherto resisted its influence will be compelled by the force of its logic.

A comparison of these two groupings shows the most prominent difference in what is usually termed the upper house, and further reveals therein the presence of an element peculiar to monarchies and for obvious reasons not to be found in republics,—the hereditary principle. This takes two, or rather three, forms: first, a purely hereditary right of membership; second, hereditary elective qualification; and third, an hereditary right conditioned by pecuniary or property qualification. To these may be added another distinction, that of life membership appointed by the chief executive of the State. But this distinction is not one of necessity. There is nothing in the nature of republics which need exclude this mode of creating legislative membership. Yet it is a form almost, if not entirely, absent from republican Constitutions, and frequent in monarchical governments. The reason of this may be easily surmised. It is the nature of monarchies to aggrandise the monarch and to create a privileged class, to associate the two in governmental functions, and to vest in the ruler the power of political appointment. The presence of these forms in States which have entered into modern Constitutionalism is an evidence of the ten-

acity of custom and tradition, and indicates that the State in which they survive has attained its present status by an evolutionary process. There is here a suggestion that an extension of this process will be fatal to such forms, unless experience should prove that their survival is an evidence of fitness.

It is not usual to find either the hereditary or the appointment method alone; and but seldom do the two forms united constitute the upper legislative chamber. More frequently they are only some of its elements. This union with more liberal forms may serve a valuable purpose. The value is to be tested by experience. These two principles have a firm foothold in the German States, in Spain, and in Italy. They have no present existence in Belgium, in Holland, nor in the Scandinavian kingdoms, excepting in Denmark, where the appointment system occupies an unimportant space. History prepares us to find this difference. The north-western part of Europe, the original home of the Anglo-Saxon race, is less wedded to the monarchic and autocratic principle than is the rest of the continent. The Ecclesiastical office, as an element of the higher legislative assembly, is connected only with the monarchic system. Eliminating from discussion these elements peculiar to the legislative bodies in monarchies, the division heretofore made may be rejected; and for the consideration of this relative construction of the two forms of legislation, Constitutional States in general may be the object of study.

The methods of election depend greatly upon the principle of representation, based upon local or territorial divisions as States or Provinces, upon the system of landed estates, and upon certain established institutions or certain officials. But the principle of representation in its different aspects is a topic of separate consideration. Direct elections are by the vote for candidates immediately; indirect, through the medium of an elective body.

The purpose of indirection is greater deliberation, calmer consideration, and freedom from popular agitation and impulse. A mode of reaching an approximation to unanimity is obtained by requiring a majority for election, and the actual voice of a certain proportion of all entitled to the suffrage.

The qualifications for membership, other than hereditary and official, are made dependent on age, varying from twenty-one to forty years; on citizenship, either by nativity or by a number of years of residence, varying from seven to ten; on possession of property or of income; on degree of taxation. The term of office, when not for life, varies from two to nine years. The electoral qualification, when not of the degree of universal or manhood suffrage, is subject to a variety of limitations, such as a certain age, literary ability, official position, possession of property or income, a fixed taxation, membership of academies and commercial institutions, professorships in universities, ownership of landed estates. These are the methods adopted in the constitution of legislative bodies in the chief States possessing Constitutional systems, and applied to both legislative chambers.

A comparison of these two chambers as in fact constituted would require a detailed presentation of existing forms. It is sufficient to observe the interest, which is everywhere evidenced, of giving to the upper house a longer stability, and a higher degree of qualification both in its members and in their electors. Another fact is of much interest, that there is a greater difference observable between the two houses in those States which have retained the hereditary or aristocratic features; and also that there is a tendency towards what is termed the popular feature of the lower house. This, with a reduction of the powers of the members of the upper house, shows a general movement towards assimilation of forms and principles. In the republican States the distinction

between the two chambers lies more in the degree than in the kind of qualification, in greater length of term of office, some difference in forms and functions, and in mode of election. A unique mode of distinction between the houses is found in Norway, where the whole legislature is elected as one body and subsequently separated into two chambers with a large disparity of numbers and with some distinction of functions.

Apart from the division into chambers, and viewing legislative bodies as units, we may pass in review the qualities which have been made to attach to membership in these bodies by the Constitutions of different States. This affords an opportunity for critical and comparative study of the principles at the base of legislative construction.

The hereditary principle as expressed in some monarchical States varies in kind. Hereditary right pure and simple resides in a body of nobles or in members of a royal or princely family. But the hereditary principle is also found in a qualified or restricted sense. In this sense it vests only an eligibility—a possibility of being appointed by the executive, or of being elected for life or for a term of years by the body of which one is a member or by qualified voters of a province or district. The hereditary right is also sometimes conditioned by pecuniary qualification. Hereditary right as applied to the ruler in monarchy has been considered in a prior chapter. As applied to a legislature it can have no larger sanction, can give no greater assurance of competency. Membership in a legislative body must base its claim either in general fitness for the duties of office or on a theory of representation. The degree of competency which heredity affords may be dismissed from the question. To be considered representative, a hereditary class must represent what belongs to that class alone. Its most intimate connection has hitherto been with the landed interest. But

at the same time it has nowhere an exclusive claim in this respect. Its representative feature, then, seems limited to itself—to whatever of privilege or honour resides in that class. In the present condition of Political Science, that is not considered a legitimate basis of representation. The limitation imposed by election or appointment would seem to be in mitigation of whatever is objectionable in hereditary legislative class. Selection intrudes to a certain degree the element of fitness. The qualification of property adds also the representative feature. The House of Lords in Great Britain is peculiar in many respects. Its constitution is partly hereditary, partly hereditary elective, and partly, in the clerical feature, official. But the most marked effective characteristics are the peculiar intimate relations existing between the hereditary nobility and the commonalty, its modernisation effected by frequent accessions, and a certain natural selection as to its active members. To these may be added a consciousness that its tenure of legislative office is somewhat uncertain. But whatever corrective influences may counteract the inherent defects of system, modern science must regard the hereditary legislator as an anomaly.

Next to the hereditary system in point of permanence, is the method of appointment of members of the upper house for life. This exists in many of the monarchical governments of Europe and in the parliament of the Dominion of Canada. The life-membership in France ceases to exist in each instance as vacancies occur. There are several characteristic features in this system. Canada as a provincial government permits the appointment by the Governor-General for life of all the members of the upper house. Elsewhere there is almost complete coincidence in the appointment of such members by the Crown, and in the fact that they are only a fraction of the whole membership. The extent of the power of

appointment is in one or more instances unlimited; in others, restricted to a definite number or a definite proportion, varying in different States. Frequently the power is conditioned by requisite qualification of age, of citizenship, of office, of possession of property or taxation, and somewhere by personal distinction or valued service. Both hereditary succession and life appointments serve as a marked distinction between the two chambers. They are somewhat akin in their aristocratic element, and in their association with the executive authority of the State. At the same time there are marked distinctions decidedly to the credit of the life-membership. There is selection presumably with reference to fitness; and where conditions are Constitutionally supplied, these are evidently in the line of personal worth and character. It is possible that the mode of appointment and the extremity of tenure may tend to too great a class preference and a lack of appreciation of general needs essential to judicious legislation for a whole community. Life-membership is not open to criticism of the same nature or force which might be applied to hereditary membership. The question of its efficiency may in special cases be submitted to the decision of experience.

Membership by virtue of office is less frequent and less conspicuous than the previously mentioned condition. Among the entitling offices are the highest clerical offices of bishop and archbishop and heads of Chapters, chiefs of municipal corporations, of councils of State, or of tribunals. There seems to be no natural relation between the possession of office and legislative duties. The duties of office are ministerial and limited by routine, and are within a restricted horizon. Their experience does not afford the qualification for the broader expanse of legislative action. In fact the mental states induced by ministerial and legislative practice seem to be antagonistic. This is recognised in the provisions of some Constitutions

forbidding the concomitance of public office and legislative membership, with exception as to the higher offices of the State, which are intimately associated with and dependent upon the legislative body. In the instances where official position grants membership in the upper house of the legislature, the idea of representation prevails. Clerical representation can naturally be only where connection exists between Church and State. Officers of the higher State council may have legislative position when the mode of governmental administration demands their close association; but the military and naval forces are subordinate to government, executing its demands, and subject to its jurisdiction. The judiciary is a department of government. These cannot, therefore, be included in any principle of representation.

Elective membership of the legislative body is guarded by rules as to qualification, mode of election, and length of term. As to personal qualification, citizenship is naturally required. The importance of this requirement will not probably be denied. But the distinction between the native and naturalised citizen is of moment proportioned to the severity of the rule of admission. Probably most States make no distinction in this regard as to legislative qualification, and probably most States are cautious as to whom they admit to citizenship and to political rights. Laxity in this respect is always a danger to the State. But this danger may be somewhat mitigated by imposing on the naturalised citizen a certain period of citizenship as a prerequisite to legislative eligibility. In The United States, not yet awakened to the supreme need of guarding political rights, residential citizenship of a certain period is required, nine years as to the Senate, seven years as to the House of Representatives. In one other State the residential period is extended to ten years. The age qualification is found to vary in different States between twenty-one and forty

years. When the period of citizenship and the age requirement are found as a condition to membership of both houses, it is common to find a larger period and a greater age ascribed to membership of the upper house. This distinction does not always seem to be justified by a difference of functions. Presumably the object of a required period of citizenship is to afford an opportunity, if not a guaranty, of sufficient acquaintance with the genius of a people and the nature of the political structures of the State; the object of the age qualification, to supply the required education and experience in political affairs. Unless, then, there is to be observed in the prescribed office of the lower house that which demands less of intelligence and experience than the functions of the upper house demand, the reason for the difference in such qualifications is not apparent. In very few States is the possession of property or the payment of taxes made a requisite for legislative membership, but frequently they are found in the list of electoral qualifications. The term of legislative office extends from five to nine years in upper houses, to from two to six years in the lower house. The period of service thus forms a prominent distinctive feature. It is evidently based on principle of representation and of counterpoise. The term "popular" is very generally applied to the lower house, and indicates its immediate representative character. To fulfil this character comparative frequency of election is imperative, a constant contact with those whom it represents, a certain sensitiveness to popular sentiment and popular needs, only to be maintained by frequency of elections. But the legislative office would be imperfectly fulfilled if popular demands alone directed its course. It is necessary for intelligent legislation not only to keep informed of present needs and conditions of the people, but also to guard their interests by judicious methods. The counterpoise to the tendency to yield to the force of popular demands

is sought in the different constitution of the upper chamber, in the various modes above described, and by a longer term of office, and particularly by continuity of existence. This continuity may be effected by life-membership, or by the rule found in many States of dividing the body into two or more classes, only one class being renewed at any one time. The large proportion of experienced members always present tends to conservatism, and gives the correcting influence of experience.

The two essential qualities of the legislative body, representation and personal competence, are closely associated with two modes of election, the direct and the indirect. The term "indirect election" needs precision. To give full force to the notion of election and of indirectness there should be an intermediate body elected by the qualified voters in a State for the express purpose of electing legislative officers. This method is not common, and in an unmixed form still less common. The undoubted purpose of such a system is to combine the electoral right with the deliberation and intelligent choice to be found in a smaller selected body. How easily the purpose may be defeated is evidenced by the practice of the Electoral College in selecting the President of The United States. The Senators of The United States are selected by the legislatures of the States they respectively represent; but these are already existing bodies, and not specially electoral. In fact, throughout Constitutional States various bodies have, either solely or with others, the right to elect, such as municipal or district Councils, Chambers of Commerce, members of universities, and others. Among the qualifications of voters, in addition to citizenship and man's estate, are found those of literary ability, of property, or income, or taxation, the possession of landed estates, etc. Unquestionably many of the qualifications are imposed with a view to secure intelligence and honesty in the selection,—and this

indeed is essential to the success of any electoral system. Many also are based on the principle of representation; and a just principle of representation is equally within a scheme of general good.

Just what representation is, in effect, and the plan on which it may be adjusted, demands thoughtful consideration. If the whole legislative body is elected by the whole electorate, there is not, strictly speaking, representation. There is simply a selection of a body of men whose duty is to legislate for the general interest of the whole community. But representation seems to imply special interests not shared by the whole community. These interests are not necessarily antagonistic to the general good, only not of equal extent. They may, in fact, be a part of the general scheme of legislative action. They may, on the other hand, be hostile to such general scheme, and favour private as opposed to public interest. Upon this question will turn the point of just or erroneous systems of representation. Where the electorate is divided locally, thus selecting only a portion of the legislative body, representation becomes a possibility owing to the probability that there will be found within these geographical divisions interests not elsewhere existent. But representation arising from such circumstance is empirical, accidental, not founded on proportionate values of represented interests.

It may seem that even when all the legislative members are elected by the whole body of voters, there is something of special representation, of the majority as opposed to the minority. But unless the majority represents merely the triumph of a party organisation having interests peculiar to itself and hostile to those of the minority, there is not special representation. If the electoral contest turns upon the adoption of a special public policy or of a political theory, the result defines the course and method of legislation, but of legislation in the direct

interest both of the majority and the minority. This is an instance of the practical extension of the democratic form. The voice of the people, or rather the voice of the larger part of those to whom the voting qualification belongs, possibly only a minority of the whole people, thus in a general way determines and controls legislative action, and to an extent delivers its mandate to its delegates. Probably the best idea, and the original idea, of legislative authority is that those intrusted with it are selected by reason of their fitness, not bound by pledge or instruction. This fitness, however, needs to be supplemented by a knowledge of the just needs of the people. Their needs are not uniform throughout the whole community. They vary with the differing characteristics to be found among all peoples. As far as these varied interests are justly within governmental care, they deserve consideration, and this is to be obtained by divisions in the legislative body. Here is truly the scheme of representation, only needing to be adjusted to the kinds and the quality of the interests which it embraces.

The idea of special representation implies either that the particular class represented is entitled to special privilege or that it needs protection against imposition on the part of the rest of the community. Effective representation implies a degree of special power to the extent of its voice in legislative operations either as constituting a separate chamber or having a special unit of voting power. The States-General in 1789 destroyed this unit and gave to the Clergy and the Nobility simple representation coincident but not coextensive with that of the Third Estate. The House of Lords is a class organisation, but it is safe to say that the strength of its tenure is inversely as its disposition to maintain class privilege. The most advanced Political Science discards the idea of class privilege, though such exists as a fact in some Constitutional States. Interests can extend legitimate

influence in legislation only by representation. The question then arises, what, if any, interests are entitled to representation, and what force they may exert in shaping or controlling legislative action. If by circumstances numerical predominance gives to any one interest a controlling force, there is the liability to precisely the same fault found where a class appears as a separate body or a unit; and this is an accident to be guarded against in Constitutional construction.

The divisions and sub-divisions of a people effected by the varieties of interests are numerous and diverse, and increase with the progress of civilisation. It follows that any scheme constituting each of these an electorate would be impracticable. May there be interests sufficiently distinct and of such special importance for one reason or another as to entitle them to special representation? Interests are not absolutely exclusive. They intermingle, cross, and re-cross one another. For example, if the religious element should be one basis of representation and the industrial element another basis, some members of society agreeing in one division would be in opposition in another. There is then a lack of homogeneity in representation. The religious element is held to be of paramount importance, and among people enlists the strongest feeling. If the diverse religious elements are allowed special representation, conflicts are likely to arise, severe in proportion to the momentous nature of the interests involved. Religious freedom is not likely to result where opportunities for enforcement of sectional interests exist. An established Church, for instance, is not apt to favour general religious tolerance. Similarly, industries, if represented, are liable to antagonise one another. And so throughout all the various interests which might form a basis of representation. It would seem, then, that any scheme of special representation is impracticable, owing to the great diversity of interests,

and unwise, because of the opportunity it would offer for antagonism and obstruction of legislative action. The protection due to special interest must be found in special Constitutional provisions and restrictions. General representation, the distinguishing feature of the modern governmental organisation, gives, in theory, the opportunity to all the people to have their welfare protected by their selected representatives.

The logical conclusion derived from this idea points to universal suffrage, an electorate coextensive with population, or with that portion of the population which is decreed capable of the exercise of that right by a fixed qualification of age. But this conclusion must be modified by circumstances and conditions, and the qualification just named suggests a principle of modification. The purpose of an extension of suffrage is to give enlarged representation. But this extension is everywhere defined by the fact that the possession of a certain degree of maturity is essential to an intelligent exercise of this function. Similarly, irrespective of age, the possession of certain intellectual and moral qualities is equally essential to its proper exercise. It lies, then, strictly within the representative idea to so limit the right of suffrage as to best secure the purpose for which it is designed, viz., to attain to the best expression of the representative idea. There is always the opportunity in unlimited suffrage for undue class influence and power,—for the very evils which are liable to flow from special representation. But Political Science teaches that the tendency should be towards extension of the suffrage in order to give the fullest expression of the representative idea within the safe limit of honest and intelligent action—a limit governed by the moral and intellectual condition of a people.

It is sometimes thought that the power of the majority is, in effect, a denial of representation on the part of the

minority. That would depend on the line of division between the majority and the minority. Ordinarily, the various interests existing within a community are to be found equally within the ranks both of the majority and minority, and consequently there is no room for partiality; but if parties should be divided on the basis of class interest, or upon purely sectional questions, there would be an undue prominence and power. In a similar way the larger and less intelligent class might be arrayed against the smaller and more cultivated; and it is evident that in such case unwise and injudicious legislation might result, prompted not by consideration of the best interests of the community, but by a supposed class advantage. This possibility is greatly enhanced by extension of suffrage. Various schemes of proportional representation have been advanced. The effect of these schemes depends much upon whether they accomplish merely representative or different degrees of power. The logical end of any plan of what is called "minority representation" is that each voting unit may elect a number of representatives proportionate to its comparative voting strength. A plan has been devised which, if successful in action, will accomplish this result, a plan applicable of course only to a more or less extensive general-ticket system. The result will be that in the legislative body will be found groups where numerical strength is as the numerical strength of their respective electors. It must be noted that the representation here constituted is purely a representation of a voting body, and it is important to know what a voting body represents.

It seems inevitable that parties should exist from the fact that in large communities individual action counts for little and united action alone is effective, and that a coincidence of opinion upon political questions forms a unit of action. That parties shall be, there must be agreement and disagreement. The representation effected by

election is, then, not a representation of the varied interests existing in a community, but of party unity. In its inception almost every political party finds its basis upon some question of greater or less moment, some vital principle of governmental science, some peculiar governmental policy, or some interest affecting a large number in the community; of sufficient power they must be to effect cohesion. To a party so created there must be conceded the legitimate right to enforce its views or interests according to Constitutional methods. Its principles of governmental science or of policy may be right or wrong, the interests which it advocates may be or may not be entitled to governmental support. The respect to be accorded to any party depends on the justness and purity of its aim. It is usually the history of great parties that they do not cease to exist when the purpose of their creation is accomplished. The organisation and discipline perfected by time and necessity have given strength to its leaders and a cohesion to its followers not easily to be set aside. Here ensues a period of degeneration. That which was constituted for a purpose of greater or less moment has become simply an organisation, a machine to be managed for the benefit of the comparative few who have it in control. It is true that parties of long standing often advocate and maintain distinctive political principles or political policy entitled to respect. Usually this serves as a claim of consideration, but has little weight compared with that of party organisation.

It is curious to note the psychological condition of a people which leads it to support a body whose claim to support can no longer be recognised. It is evident that although in a highly organised political party the profits and advantages which a party can give, are for the benefit of the comparatively few who do the work and receive the rewards, yet the very existence of the party itself is dependent on the support it receives from a large mass of

the people who call themselves its members. Of this large number many have no special sympathy with the chief political principle or policy which the party may have adopted, many are unable to comprehend it, and many are in fact conscious of their party's errors and favourable to opposite methods. Yet the mass is held together by a spirit of devotion to that with which it has long been associated. The antagonism aroused by frequent contest with opposing parties has intensified this feeling, and thus a partisan feeling is evoked whose intensity is not proportioned to the importance of the principle involved or the interest which party members may have in party questions. Similar feelings often exist where people are associated by social considerations, by mere neighbourhood, or by various circumstances which may form a basis of union, though often not in themselves matters on which momentous interests revolve. This spirit of partisanship is the stronghold of the party, gives it force and permanence. Singularly enough, partisanship excites in its votaries a feeling of self-admiration, and adherence to party is termed loyalty, though it is often a mere blind and unreasoning loyalty. There seems at this time, in The United States at least, a disposition to escape from this thraldom, to view party principles and party methods for what they are really worth, to hold those who administer party affairs strictly accountable, and, in effect, to make the very existence of a party dependent on its fitness.

Party force is rendered operative by the rule of the majority, and it is with a view to correct and limit this force that minority representation is advocated. But minority representation, excepting in some special Constitutional provisions, does not detract from majority rule. It is not a force; its effect is a moral effect. The presence in a legislative body of a number of members not of the dominant party, enforces discussion and deliberation.

An opportunity is afforded of criticising the methods and the principles advocated by the ruling party, and exposing them to the public view, of presenting opposite interests and claims of right. The minority is here strictly representative. It would seem desirable that for the public good there should not be in a deliberative assembly an extremely large majority. A party minority sufficiently impressive as to size promotes caution and curbs arrogance. But mere representation, the mere power to protest, and of enforcing discussion, valuable in itself, lacks the vigour which belongs to positive legislative force.

The Belgian plan of “plural voting” is an attempt to add power to representation. It acts upon constituencies. In addition to the single vote which is given to every qualified voter, a second vote is given to a class of persons of a certain condition, and two supplementary votes are given to persons having certain intellectual qualifications, though no one person may have more than three votes. The aim and intent is to counteract mere numerical force and to give to such persons in a country whose industrial and social success have given them a larger interest in the welfare of the State, and to such whose superior intelligence permits a better understanding of political requirements, not only proportional representation, but proportional power as well. The aim is in the right direction. Whether or not the particular plan in question is adapted to its purpose, it must be remembered that political principles and political theories are not to be valued by the failure or success of the methods adopted to make them effectual.

The question of representation and of the means of securing it here suggests two opposite methods of election and their respective effects and possibilities. In the one all the members of a legislative body are elected by all the voters. In the other the constituencies are divided,

and each division elects but one member. These are in fact extreme positions. The question turns often upon the minuteness of the division of the electorate and the number of persons subject to the vote of each division. These are termed respectively the general-ticket and the district system. The Constitutional history of The United States has shown a very strong disposition towards the district system. France, under its present Constitution, has vacillated between the *Scrutin de Liste* and the *Scrutin d'Arrondissement*, and seems finally to have determined upon the latter, the district system. This, in fact, seems the tendency of the age. There are undoubtedly advantages and disadvantages in each plan, and their respective merits are to be balanced against each other. In the general-ticket system there is a probability that the representatives whom it selects, being widely known and of assured reputation, will possess high personal quality and be well fitted for the office to which they are deputed. The system, too, gives complete majority rule, leaves little to chance, and gives full scope to the operation of a fixed electoral system. The district system presumably selects persons of local reputation only and less well fitted for the management of national affairs, but it at the same time produces representatives well acquainted with the needs of their constituencies. It may effect in an uncertain and irregular way minority representation, and may even result in minority rule, it being easily possible that a general minority might form local majorities. The advantage seems to lie with the general-ticket system, in that it is more accurate in its operation, and less liable to defeat Constitutional provisions. The general tendency towards the district system may possibly be explained by the more direct representation of popular requirements which it affords. Less creditable explanations may be found, that it affords better opportunity for the advancement of politicians of

lesser note, and that the popular mind is gratified by a closer association with public affairs which this system apparently grants. It would seem, then, that direct representation of interests is impracticable, and that an elective system with complete or modified majority rule represents only political policies, theories, and modes of action. Reliance must be had upon the more or less intimate association of representatives with their electors, the intimacy proportionate to the sub-division in the district system. To counteract the disadvantages which have been pointed out as incident to the district system and to retain its representative advantages, a method is to be sought by regulating the size of election districts, giving as far as possible the advantages of the general-ticket system and retaining the quality of district representation. This, like all plans of action, cannot be prescribed in advance. It must be adjusted to the circumstances and conditions of each case.

## CHAPTER VI

### CONSTITUTIONS—CONSTRUCTIVE—*Continued*

AMID the various plans which we find adopted in different countries in the differentiation of the two houses of legislature, plans presumably suited to the character of the nation adopting them, we may seek a distinguishing principle; and a certain uniformity of divergence serves to illustrate the principle. Membership of the upper house is usually distinguished by a greater maturity of age, a larger experience acquired by longer term of office, a continuity obtained by classification and but gradual change, thus utilising the combined experience of the body, and having in general a higher degree of intellectual qualification. The general character of an upper house may be said to combine statesman-like qualities, appreciation of scientific methods, and a tendency to conservatism. The lower house is usually termed the more popular branch of the legislature, meaning that it has a close association with the people, reflecting their needs and desires, and following all changes of conditions. Here it is that the representative idea finds a practical exposition. The above distinction may not everywhere be found; but it is a distinction which seems to be aimed at in legislative systems whose creation is one of direct design. The advantage of two chambers is supposed to lie in the larger enforced deliberation; but the chief advantage seems to be found in the distinctive characteristics of the two houses—the one being popularly representative, the other restraining exaggerated

tendencies and sectional encroachments, and regarding the national more than the individual life. This distinction seems to be emphasised in the construction of the houses of legislature in The United States, and in the terms by which they are described. The Senate, etymologically the council of the elders, with its features of continuity of term, extended period of office, and indirect election, presents a different quality of legislative function from that of the House of Representatives properly so called. In suggestions which have been made to alter the constitution of the Senate and impose on it the more popular idea, the fact is overlooked that the Senate is not, strictly speaking, the representative body. In an enlarged sense all governmental offices are representative in that they are acting in the interest of the community; but in the more correct and restricted sense representation is the office of the lower and popular branch of the legislative organisation. The distinctive formulation of functions, the scientific comprehension of national needs on the one side, and the presentation of popular requirements on the other, with the final blending into a resulting harmony, is the valued purpose of the bi-cameral system.

Of the three governmental departments, the judiciary pursues its functions with but little direct influence from the other departments; but the legislative and the executive are more closely associated and mutually dependent. The part which the executive performs in legislative functions first claims attention. That it performs any part at all may arise from two causes, the one historical, the other by design. In States whose present Constitutions are engrafted on an older state of monarchical rule, the powers of the executive in legislation are a survival and a limitation of monarchical power. A present condition, then, marks the result of a long-continued contest for supremacy between the monarch and his subjects.

The field of this contest is more than elsewhere conspicuous in the history of England, as its progress was longer continued, the decadence of monarchical power and the corresponding increase of legislative power more gradual, and at last the legislative supremacy more complete, than in other States. The final result of this contest as witnessed in modern States may exhibit more or less exactly the limit to which this contest may be carried. The residuum of legislative power thus left with the executive may accord with that degree of power which in newly constituted States is vested by design. The design manifestly is the securing a greater deliberation and caution in legislation, an advised passage of measures according to administrative needs, in some instances a method of obtaining popular approval or dissatisfaction, and a mutual dependence productive of harmony of administrative and legislative action. To effect these results specific modes of executive participation may be devised. These are: required assent, and its correlative, the veto, either final or limited; the right of initiation of legislative measures; the duty of recommending measures thought to concern the public welfare; and the power of dissolving the legislative body, with its consequent appeal to the public judgment.

The subject of executive assent is comprised in the consideration of executive veto. A veto is absolute or limited with a greater or less degree of tenuity. The effect of absolute veto is, when exerted, to render nugatory the action of both legislative houses. It gives the executive a power superior to that which attaches to each house in the peculiar province of legislative bodies. It is a confusion of functions. It marks a continuance of extreme monarchism, a not very advanced stage in the progress of representative government. That it is a negative power with no legislative initiative detracts but partially from its failure of adaptation to advanced governmental ideas. This right exists in some Constitutional

States where the monarchical theory of government is not yet extinct. A qualified veto bases its right to be on distinct grounds. Greater deliberation may be thereby attained, and security against unwise legislation, especially in matters bearing upon administrative action. There is between the legislative and the executive departments a mutuality and an interdependence. Each needs the aid of the other in the performance of its functions. Hence their association accords with the nature of their respective duties. The provisions found in States for the exercise of limited veto, though varied, illustrate its purpose. In France it is limited to mere reconsideration, with the right reserved to the legislature to enact the measure a second time, which then becomes a law. In The United States the President, in case of his non-approval of a measure, is required to return the bill to the house from which it originated, but is also required to specify his objections to the measure. Additional force is given to the presidential restriction by the requirement that to become a law the measure must be passed a second time by two-thirds of each house. In both these instances of limited veto, its purpose of securing a greater maturity of legislation is exhibited. The French plan enforces reconsideration; that of The United States, reconsideration supplemented by additional majority. England with its fondness for overriding law by custom permits the right of veto in theory, but denies it in practice. Executive influence on legislation must then be sought in other methods.

The largest active participation of the executive in legislation is where the power resides in it of direct initiation of measures in the legislative bodies, with the power of summoning and of dissolving them. These features are not found in the Constitution of The United States. The provision which requires the President "to give to the Congress information of the state of the Union, and

recommend to their consideration such measures as he shall judge necessary and expedient," is suggestive and advisory, and the power to, "on extraordinary occasions, convene both houses or either of them" is of the same nature, suggestive of present needs. But for introduction of specific measures there is no authority. Perhaps the nearest approach to direct legislation is in the negotiation of treaties with foreign States, which when confirmed by the Senate become "the supreme law of the land."

In some Constitutional States the direct initiation of measures by the executive department and the power of dissolution of one branch of the legislative body, form a close operative connection between the legislative and the executive departments. Upon these points mainly turns the distinction between what we may term the two prominent types of modern Constitutional systems of government. Of these two types the governments of Great Britain and of The United States are the examples. Historically, all Constitutional States are of modern origin, and it is possible to recognise the influence of these two types. The tendency of European States is to follow the model of Great Britain, and of American States to adopt that of The United States. In view of this influence it is instructive to observe the distinctive features of these two systems, to study their comparative merits, and their applicability to existing peoples.

In Great Britain is to be found a legislature whose upper house is mostly hereditary and permanent, and whose lower house is elective, its extreme term being limited, but also subject to further limitation at the pleasure of the executive. In the executive office the monarch plays so slight a part that he may conveniently be disregarded. His formal functions are blended with those of the real executive, the ministry. The chief formal part of monarchical action is the selection of one

who shall form the ministry. The selection of a ministry is governed by its probable acceptability by the dominant majority of the lower house. The ministry thus formed takes upon itself the management of government, especially with reference to its general policy, and becomes the mainspring and vital force of governmental action. But whenever the support and co-operation of the legislature is necessary to the ministerial plans, such support must be granted, or a lack of sympathy exists, and a crisis is reached. In such case the present ministry must cease and be replaced by another, or the power of dissolution is exerted and a new election produces a new house, which, if still hostile to the ministry, compels its resignation. In The United States are found a legislative body elected at fixed periods and with a fixed tenure, having the sole initiation of legislation, dictated only by its own pleasure or by the suggestion and advice of the executive, and with the power to override a limited veto by a vote of two-thirds of each legislative house; and an executive likewise elected at fixed times and with a fixed tenure of office, subject only to termination by malfeasance of office, with no direct initiation of legislation, and with only a qualified veto, but, with only a slight qualification, the absolute chief of the administrative department.

Two contrasting types of governmental systems are here presented. The salient features of the English system are: the lead which the executive takes in legislative measures, and its dependence on the lower house of the legislature for support in action, and indeed for its very existence; the supremacy of the legislature over the executive; and the direct dependence of the legislature upon the electorate, as the executive power of dissolution is only an appeal to popular decision. The system is essentially democratic, and yet it is better adapted to limited monarchy than when an elective executive exists,

as the position of the chief executive is one more of dignity than of power, and its dignity needs the support of the sentiment which attaches to hereditary monarchy. The success of this system, with the predominating influence of the lower house and the direct bearing of the popular will upon both the legislature and the executive, depends upon the character of the electorate.

The salient points of that which may be termed "the American system" are: the independence of the legislative and of the executive, secured by fixity of tenure; the distinction of administrative and legislative functions; and the control of office maintained by the chief executive, his subordinates being under his direction, and he alone being politically responsible for the administration of executive functions. In consequence of these provisions the operation of this system is essentially different from that of the English system. The certain degree of co-operation of the two departments Constitutionally provided, while it retains the vigour of independent action, by a mutual system of checks enforces deliberation in action. It is less democratic, in that the popular will can make itself felt only at stated times, and an absence of direct appeal limits the effect of partisanship and popular excitement at critical moments.

The two systems are so essentially distinct and peculiar that an attempt to engraft on one the special attributes of the other is likely to be fatal to the integrity of either. The proposition to give cabinet offices voice in the legislature of The United States to advocate and explain administrative measures, would seem to come within this objection. It establishes an incongruity, and seeks to apply a method foreign to that Constitutionally provided. There is no ministry in the government of The United States. Cabinet officers are merely heads of administrative departments, and are advisory as to general governmental policy. The executive does not initiate legislation

or formulate bills. The details of legislation are strictly within the legislative office, with the power to obtain any needed information by direct request made to the executive. The position of cabinet officers in the legislature would be one without force or authority, and would create a confusion of functions. To grant them a position similar to that of a ministry would overturn the existing system. The position of the President of the French Republic is peculiar. He is the executive head, but his subordinates, the ministers, are responsible not to him but to the legislature. Here is a divided and weakened authority, a portion at least of the executive power being directly under legislative control. His position is similar to that of most monarchs under Constitutional and representative systems. But the one is of creation, and the other by regular growth. The monarch is shorn of many of the powers he formerly possessed; but those which he retains have the prestige of antiquity and the dignity of precedent. This quality is lacking in a newly created presidential office. Its dignity relies upon power and authority.

A final comparison of these two systems gives rise to the opinion that, when there exists a large popular element due to any extended suffrage, the checks and balances and enforced deliberation in action which appertain to the American system are essential to safe governmental operations; and that the English or ministerial system will need to be modified when the condition of a large popular participation in governmental action may arise.

There is always a possibility that action may be hampered by conflict between the executive and the legislative body. If the feelings which provoke such opposition are mainly within the governmental bodies, sound public opinion exerts a corrective office. If they affect the people generally, it happens at a time of great excite-

ment when the majority is liable to override and probably oppress the minority. At such time a direct appeal to popular decision may do a serious wrong. But if the decision is reserved until the periodic election, the influence of time and reflection has an opportunity to make itself felt. To this effect a certain frequency of elections is essential.

In every State where government is not a despotism a large portion of the people performs a part in political affairs. Among monarchies of a greater or less degree of absolutism there existed councils of the nobles. The States-General of France from the beginning of the fourteenth century, though with little power and seldom acting, showed that there resided among the people a claim of popular right which nearly five centuries later conspicuously asserted itself. The present development of the representative system largely increases popular participation in governmental action. This participation varies in degree and in directness. The most direct instance is that of the Swiss Referendum. By this Constitutional provision of the Swiss Republic, the revision or the annulment of a legislative act, if demanded by the petition of a certain proportional number of the citizens—which is in fact but a small proportion of the whole population,—or by a certain proportionate number of the Cantons, is submitted to the direct vote of the nation. A revision of the Constitution may be determined in the same manner upon the demand of a larger numerical proportion of the citizens. The remarkable feature of this provision is that not only the revision of a Constitution or of an enacted law, but also the original movement towards such revision is a popular act. This initiative is an extremity of the democratic idea. In the Constitution of The United States the risk of hasty or unwise Constitutional amendment is carefully guarded against by requiring initiative by a large proportion of the members

of the national legislature or a similar proportionate number of provincial legislatures, and the final sanction of three-fourths of the several provincial States or by conventions in three-fourths thereof.

The French plebiscite is a method of obtaining by universal suffrage a popular endorsement of a new form of government. There is no popular initiative, but only an assent to, or a dissent from, a previously concocted plan. That it has been used to give sanction to a republic, to an empire, and to intermediate forms, gives it a character more formal than real. That which in Great Britain is termed "an appeal to the country" is the result of a dissolution of Parliament when there is a conflict of policy between the ministry and the lower house. As the disagreement turns upon political questions of greater or less moment the electorate becomes a court of appeal, and by the composition of a new house decides the question at issue. Where no such methods of referring questions immediately to public decision exist, there remains only the indirect method of periodic elections.

Disregarding the plebiscite as abnormal and irregular, there remain the three modes of popular participation, the first two direct, and the third the indirect mode. The referendum is by far the most extended instance of the democratic idea, in that it is both initiative and decisive in its action; but in the appeal to the country popular action is taken only occasionally and not at popular instance. It may be safely said that each is, to the extent to which it goes, an interference with the integrity of the representative system, which demands that the interests of the country shall be intrusted to its delegates without direct mandate as to a special question. It would seem that an election occurring according to the fixed periodic system could give little or no opportunity for public expression upon the merits of a particular question. The difference of time between the controversy

and the popular resolution of the controversy marks the distinction between the direct and the indirect modes of popular determination of a political question. The referendum is an ever-constant instrument of popular participation in legislative action. The "appeal to the country" acts only at a crisis. The proper working of governmental machinery demands harmony of action between the executive and the legislative. But the harmony is sometimes disturbed, and it would seem that this disturbance is likely to occur proportionately to the mutual dependence of the two departments. A disagreement between the executive and the legislative, sufficiently grave to disturb governmental action, is likely to turn upon some question on which the community is largely excited. An immediately enforced election of a new legislature settles the disagreement, and a majority in the electorate decides the question at issue, according to its own predilections. Periodic elections afford no such easy and direct method of settlement. The divergencies must be reconciled as best they may, until such time as a regular election may confirm the views of either the executive or the legislative. In the meantime public opinion is busy with the question, and a consciousness of this fact is present to the minds of governmental officials. The public mind is being enlightened, and at the next election an intelligent and dispassionate expression of opinion may be evoked. That public opinion may thus be operative, frequency of election is requisite. This is one of the circumstances on which length of legislative term depends. The predilection for annual elections as a safeguard against tyranny has long ago been withdrawn. That sentiment existed during the period when the struggle for a representative system and popular supremacy against monarchical and executive power was in progress. The danger which animated that sentiment no longer exists, and the legislative term, if not annual,

is usually sufficiently short to enable popular opinion to express itself upon current political topics. Lack of harmony is likely to occur also between the two legislative houses. Popular action upon the upper house cannot be so directly brought to bear, but expression of opinion acting through the lower house produces a moral effect upon both branches of the legislature. The "appeal to the country" applies only to the lower house. Constitutional methods in Great Britain seem to take but small account of the upper house.

The question, then, presents itself in determining constitutional provisions, whether or not public opinion may be permitted to express itself authoritatively upon political questions, and if so, whether in the direct or the indirect mode. The advantage of the direct mode is asserted to be that it resolves immediately any divergency between two governmental departments and effects immediate unity of action. But a solution of such a difficulty may not be judiciously afforded by popular decision at periods of popular excitement and at the instigation of partisanship. It also gives an unwise predominance to the lower branch of the legislature and to popular action. It unquestionably is an encroachment on the representative system, the essential feature of which is that the interests of the country shall be represented, not by deputies specifically instructed, but by the untrammelled judgment of the representatives themselves. A certain degree of encroachment is unavoidable from the influence of public opinion and party feeling or sentiment. The indirect decision of political questions afforded by periodic elections is given with more circumspection and freedom from excitement. Of the two modes, the direct is the more democratic, and at the same time is unfitted for the democratic elective system, as its safety lies in the higher character of a restricted electorate. When the suffrage is very general there must be a large element of risk in

the direct reference of political questions to a popular decision, a risk much diminished by the indirect mode of periodic election. It appears, then, that where the representative system, now almost universal, exists, there needs to be, to a certain extent, a popular participation in political affairs. To this extent the people perform a political function—they become an instrument in governmental action. Thus the degree of popular participation and the extent of the suffrage become a matter of Constitutional provision, to be regulated, as all governmental departments should be, with regard to fitness for the end designed. Those who look upon the right of suffrage as an inherent natural right may have that impression corrected by the thought that its exercise is the performance of a governmental function. It may be a wise maxim that the extent of the function should be inversely as the extension of the suffrage.

Some of the topics which have been discussed as proper subjects of Constitutional provision are not so regarded by all nations, but are treated as matters of legislation. The question is now suggested, What are the subjects naturally within Constitutional jurisdiction, and what test, if any, is applicable to the decision of this question? In prior pages attention has been directed to certain points of difference between legislative and Constitutional provisions,—the elasticity and changeable quality of the one, the rigidity and immutability of the other. A Constitution has also been described as of two parts,—the constructive and the restrictive. Its office, then, is to construct and define a system of government which, with limited modes of change, is intended to be permanent. The legislature operates the prescribed system, and applies its principles to the various circumstances and conditions as they from time to time arise. There seems no better way of distinguishing between enactments within the province of Constitutions and those within the pro-

vince of legislation, than the one above noted, namely, that such as are creative of a system of permanent application and are restrictive of governmental action are in the category of Constitutional acts, and such as are adapted to the regulation of popular needs within that system come under the rule of legislative duties. This distinction is not always closely regarded, and, in fact, there often may be a doubt, as to any one provision, whether it should come within the rigid rule of the Constitutional, or the flexible rule of the legislative enactments. Although a diversity of practice is observed among States as to what enactments are Constitutional and what are legislative, a just distinction between these two classes is of the first importance. Certain political provisions need the security of Constitutional permanency, but if a Constitution extends its jurisdiction beyond its just limits, it applies rigidity to that which should be flexible. The consequent inconvenience is then to be removed by amendment, and frequent amendments tend to bring the Constitutional idea into disrepute, and to create a confusion between legislative and Constitutional functions.

That members of the legislature should receive pay for their public services, or should regard them as merely honorary, is in different countries differently regarded. If this question is to be Constitutionally determined, it must be limited to the bare fact of compensation, as no fixed amount is capable of retaining a fixed value through long periods; but it is within the scope of Constitutional acts to prohibit its increase as to members while in service. By the Constitution of The United States legislative quorum and privilege of members from arrest are definite provisions. The privilege from arrest is an immunity which needs to be strictly defined, and to be guarded against unfair extension. The subject of quorum might perhaps with safety be left to legislative discretion.

An elective executive is usually a distinct Constitu-

tional creation. An hereditary executive is a pre-existing institution whose functions may be Constitutionally modified. Constitutions act upon an elective executive from its foundation. They prescribe the personal qualifications as to age, citizenship, and re-eligibility, the term and tenure of office, and compensation. As to some of these, there is an equal applicability to the hereditary executive. Its citizenship, law of succession and minority, religion and marriage, are legally prescribed. In the main, however, after the creation of the office is effected, the two classes are equally within the reach of Constitutional direction, with only such differences as are peculiar to the two forms respectively. Constitutions are naturally similar in prescribing executive functions, inasmuch as there are natural and appropriate functions appertaining to the executive office as to which there must be a coincidence, but with such specific differences as the circumstances surrounding each particular form tend to influence it. In a comprehensive study of the executive office, the points above mentioned, as pertinent to the creation of an elective executive, cannot receive direct attention. They cannot be abstractly considered; for in application they must be modified by the particular conditions to which they are applied. The interesting study of comparative Constitutional forms will evidence the truth of this proposition. But there are functions inherent to the executive office wherever resident, and these will serve as a guide to Constitutional provisions. A convenient division of executive functions into four classes will facilitate the investigation. These classes may be described as international, legislative, administrative, and judicial.

In all communication with foreign powers, the executive is the representative of the State. This implies the power to receive ambassadors of other States and to send ambassadors to such States. But there is no neces-

sary implication of the power to create diplomatic offices. The power may by the Constitution be granted or withheld; but it seems to be more within the legislative province to create office, and within that of the executive to fill and control such office when existent. For all offices must have their powers, their duration, and their compensation fixed; and these are not strictly executive duties. Does the power to maintain intercourse with another State grant the right to recognise the existence of another State? New States sometimes arise by compact or division of existing States, more frequently as a sequence of revolt. International law concerns itself in such case with the result of the conflict. The fact of a new creation and the enforced abandonment of a former rule justifies the recognition of the new order. If the recognition based upon the determination of this fact establishes relations such as usually exist between States, it would seem to be more strictly a legislative office. As before stated, diplomatic offices, the usual methods of State intercourse, are created by the legislature, though the appointments are made and managed by the executive. As to a newly constituted State, all the methods of intercourse must be established before they can be put into operation.

The executive is the negotiator between States, but the culmination of negotiation in treaties is sometimes permitted as the act of the executive, and sometimes needs the sanction of at least one of the legislative houses. But even when the complete treaty-making power is placed in executive hands, some legislation is usually necessary to carry out the terms of a treaty. Both in France and in the German Empire limitations are directly or incidentally placed upon executive acts as to treaties. All obstructions tending to hamper an otherwise complete agreement between States are Constitutional errors. To facilitate agreements, there should

somewhere reside the power to make definitive agreements, and though that power may be complex, it should be clearly defined. An agreement otherwise complete, but which fails of realisation by the neglect of some department of government to perform an essential part, not only makes previous labour futile, but is liable to provoke much ill feeling between States. The Constitution of The United States has made wise provision for such case. It intrusts the whole negotiation of treaties to the executive, but requires that each negotiation shall be sanctioned and confirmed by a large majority in the upper house of the legislature. To avoid failure to carry out the terms of a treaty, it is provided that "all treaties made, or which shall be made, under the authority, of the United States, shall be the supreme of the land."

The power to declare war is one that affects materially the welfare and happiness of a people, and is so greatly liable to abuse that it should not, as in some States, be intrusted to the executive. Where it is so intrusted, it is probably a survival of the kingly power. War, being so general in its effects, should be declared by a body numerous in itself and directly in contact with the people. The promptings of ambition and passion are more likely to influence an individual than a collective body. But the conduct of war is naturally and justly in the province of the executive. As a means not only to conduct a war, but to enforce domestic laws, the command of the military force, but not the right to raise or to increase it, is an executive duty. Disability to conclude treaties and to make war without direct sanction is subject to two exceptions: A defensive war may be prosecuted under a well-defined duty to protect the integrity of the State; and a treaty of peace follows the successful conduct of a war.

Considering then the relation of States to States, we may infer as to executive functions that they should

comprise all direct intercourse between States, all negotiations for treaties and agreements, though not necessarily their completion, the conduct of war and the conclusion of peace, defence against foreign attack, and as a means to this and other executive duties the command of the military forces, which have been organised according to the laws of the State.

The office of the executive as to legislation is partly ministerial and partly subsidiary. The summons to regular session in Great Britain follows a dissolution of Parliament. In Germany the summons must be annual. In France an extra session must be summoned upon the demand of both legislative houses. The President of The United States has the discretion to call an extra session as emergency may require. The power of dissolution is exercised only where the system of ministerial or executive responsibility exists, and its purpose is, by a new election, to sustain or to disapprove executive action. The two contrary systems of ministerial responsibility and executive independence have already been dwelt upon, and must receive later attention, as they mark distinguishing features of governmental methods. Closely associated with the ministerial system is the initiation in legislation. With an independent executive, as in The United States, this takes the modified form of legislative recommendation and advice. Constitutional provisions must vary as to which of these two systems they adopt.

Next to initiation of legislation the most prominent executive act is the veto. Advanced political practice discountenances the absolute veto. Far too great power resides in the ability to completely annul the acts of legislative bodies. In the complete ministerial system any sort of veto is out of place. That very attenuated form of veto, merely a reconsideration, which exists in the French Constitution, though enforcing valuable deliberation, has not sufficient force to conflict with the

ministerial system. The qualified veto in force in The United States accords well with the system of independent executive, and has proved to be of practical value.

The part which the executive performs in judicial affairs, though limited in extent, has a very direct bearing upon the common welfare and the correct working of the judicial system. Of the two modes of creating justices, that of appointment has an unquestioned superiority over the elective. The respective merits of these two methods have already received attention, and if appointment is adjudged to be the better plan, the question then remains in what manner such appointment is best made. It seems also to be conceded that a single executive is the fittest to make judicial appointment. The argument used against appointment by a council, or by a legislative body, is the probable lack of skilled information as to judicial qualification, and especially the influence of faction. Something of this last has been observed even in the Senate of The United States in the simple question of confirmation of executive appointments. Though such appointments have frequently in the course of history been tainted by corrupt motives, both general opinion and experience favour appointments from a source where personal responsibility is undivided and personal pride gives tone to official acts. In considering the general probability of just action on the part of individuals, an eminent political writer and statesman has expressed a sentiment which must always be taken into account in human institutions, that "the supposition of universal venality in human nature is little less an error in political reasoning than that of universal rectitude."

The argument presented in favour of an individual rather than a collective power of nominating judicial offices is reversed when applied to the pardoning power. Pardons have their justifications in the fact of human

fallibility, and the further fact that circumstances may come to light subsequent to conviction, disclosing error or modifying conditions. The necessity of somewhere vesting a power to pardon, in the interest of humanity and justice, is conceded. But it remains to be determined where such power should be placed. The security of society demands punishment of crimes duly proved, and that punishment shall not be mitigated or set aside without adequate reasons. There seems a greater probability of abuse of this right when it rests in the hands of one, than if it is placed in the jurisdiction of an existing body, or in a council with a specially delegated authority to hear and determine alleged causes for disturbing a conviction. An individual is far more easily moved by sentiment, by importunity, by fear of incurring ill will, by mistaken notions of mercy. Such motives cannot so readily influence the action of a council. Divided responsibility and conflict of opinions, which may be fatal to good judicial appointments, are favourable to the deliberation and investigation necessary to correct use of the pardoning power. It must be remembered that this power bears the same relation to justice and social security as do judicial operations. Each should be carefully guarded against error and abuse. It must be admitted that careful and elaborate arguments have been offered by distinguished jurists and statesmen in favour of delegating this power to a sole executive. The precedent of the royal ruler as the fountain of mercy may be cited, but the chief ingredient in the pardoning power is justice, and mercy is incidental to justice. In spite, then, of valued authority to the contrary, it seems that the power is more safely lodged in a council than in the executive.

Executive functions in the administrative department are the most comprehensive and the least easy to define, yet they are the chief of executive functions. The

definition of the term describes its principal office. There is, however, variety in the meaning of the term. The noun denotes the chief officer of the State; the adjective comprehends all acts of any executive nature by whomsoever performed. These acts may be classed into direct enforcement, compelling obedience to decrees and orders of the Courts, and the management of established governmental institutions. Constitutions usually and properly reserve for the chief executive the higher and more important duties of State, the minor duties being systematised and administered by officials appointed or elected as it may be determined; but the ultimate executive force, the power to compel obedience to all governmental directions, resides with the chief executive, who is endowed with the means necessary to accomplish this duty. The political divisions in large States frequently have a large degree of executive independence. There is also noticeable a tendency to push to an extreme the principle of election. If this is carried too far, the efficiency of a department must be impaired. The chief of every department should be responsible for its proper conduct. This cannot be without a certain control over subordinate officials, and this control is inconsistent with independent incumbency of minor offices. Many details of executive operations are necessarily left to legislative direction, but Constitutions may prescribe the general principles of the system. It is customary and proper in the higher governmental departments to grant to the chief executive a large share in the appointment of subordinates, subject to the sanction of some established body, and also the power of removal, which in the interest of official efficiency, it is supposed, should be unhampered. No reason is apparent why the same rules should not be extended to the lower grades of executive departments. Two antagonistic principles are here conspicuous. The predominance of either might be prejudicial to the general

welfare. They are, on the one hand, the efficiency of public office due to the power of appointment, and, on the other hand, the facilities for abuse which such power may endow.

Executive power from which apprehension of abuse may exist is described at different times by different names, as prerogative, influence, patronage. Prerogative is appertinent to the kingly office. It is the source from which the dignity and power of royalty are deduced. A comparison of royal prerogative at any two periods marks the advance in political condition. Political progress has been largely a contest between royal prerogative and popular rights. A diminution of prerogative and an extension of the sphere of legislative action are marked features of modern royal governments. The word has almost passed from use, and the terms "influence" and "patronage" express present features of executive power. The power of appointment, though incident to the performance of executive duties, if unlimited or not properly regulated, will be abused. Its purpose is to provide able and efficient subordinates. It may be used in the interest of one's self or of one's party, by maintaining a corps of officials devoted to securing the permanence of party rule, or the security of tenure in its chief representative; or it may be used to reward the services of those who have aided in party or personal success. This last is recognised and expressed by a phrase, "the spoils of office." Strangely enough, the practice is not only recognised but defended by many persons of otherwise correct notions, but whose ideas of political duties and political office are curiously perverted.

The idea of rotation in office indicates an erroneous conception of public duties. To secure unity and efficiency in office by a plan of appointment, and at the same time to guard against abuse of the system, is a Constitutional necessity. The requisite of confirmation

as to the higher grade of officials serves a good purpose; but as to them the risk of abuse of office is not so great. A system of examination for civil-service appointment is a second method, and should be an efficient one. The qualities which enable a candidate to pass an examination are not likely to be found in those to whom office is viewed as a reward for partisan service. A pass examination which allows a choice among those proved to be qualified, permits appointment; and this limited choice might be favourable to official good conduct, as it is easily possible that special personal qualities, in addition to those which examination proves, might add to personal efficiency. If the power of removal is conceded to be vested in the executive, and is unrestricted, there seems to be little opportunity for abuse if the successor of the one deposed must submit to the usual condition of selection. A certain degree of permanence in office is promoted by examination as a test of qualities. It is assuredly within the scope of a Constitution to assure the efficiency of offices and departments which it creates.

Executive responsibility is a modern doctrine. Among royal attributes are included perfection and perpetuity. Blackstone asserts, in a peculiar mode of reasoning, that the prerogative of the Crown "is created for the benefit of the people and *therefore* cannot be exerted to their prejudice"—the king, moreover, is not only incapable of doing wrong, but even of *thinking* wrong. The fiction of royal perfection, in the face of manifest royal faults, is maintained by providing, as convenient scapegoats, advisers and ministers, by whose advice and representation His Majesty is assumed to have been misled. Perpetuity is of the office, but the individual tenure of office is coincident with the individual life. No Constitutional methods exist for deposing a king on account of political misconduct. The principle of political irresponsibility

cannot accord with the doctrines of modern Political Science. But in Constitutional States which retain the monarchical system the discrepancy between the ancient forms and Constitutional ideas is reconciled by reducing the functions and prerogatives of the king, and creating a second executive in a ministry, to which the principle of political responsibility is applied. The position of a ministry in relation to the legislature, and the uncertainty of its tenure of office, have already been dwelt upon. Where the executive holds office for a fixed term, a method should exist whereby he may be rendered accountable for offences against the State. That method is impeachment. The two principal republics differ upon this subject of impeachment, both as to extent and effect. The President of France is impeachable before the Senate for the crime of high treason, and the penalty of conviction is unlimited. The President of The United States is impeachable before the Senate for "treason, bribery, or other high crimes and misdemeanours"; but the effect of conviction is limited to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit under The United States. This distinction gives the French President a larger degree of inviolability while in office, his removal being limited to conviction on one offence only. The inviolability in other cases is inferential. It seems a wise and prudent provision in the Constitution of The United States that the trial of a political officer in the hands of political bodies shall be limited in case of conviction to the effect of removal from office, leaving the criminal offence, with its ordinary penalty, to the jurisdiction of the civil courts. The peculiar features of this proceeding are its application to civil officers only, the limited effect of conviction, the requisite of a two-thirds majority for conviction, and the statement of the offence as to which it has jurisdiction. From these features the pur-

pose and the reason of the proceeding as regulated by the Constitution of The United States are to be ascertained.

The law of impeachment in Great Britain, from which the methods and procedure only have been taken, is far more comprehensive, and indicates a different intent. It gives original jurisdiction to the upper house of legislature, the highest appellate court; it inflicts the extreme of punishment, and apparently has no limit in its jurisdiction as to persons. Still the object of impeachment is everywhere the correction of official personages, and mainly for strictly political offences. In the Constitution of The United States this purpose is distinctly defined, or naturally inferred from the provisions concerning the action. The tribunal is the upper legislative house, in this case alone exercising judicial functions. The prosecutor is the lower house. The employment of these two political bodies indicates the nature of the duty to be political, and the requirement of the decision by two-thirds guards against popular feeling so liable to influence political bodies. In the tribunal and its proceedings there is a marked distinction from the methods of the ordinary courts of civil and criminal jurisdiction. To a court of impeachment those alone are amenable who are officers in the civil administration of government. A settled construction has included judicial officers and excluded members of legislature. The offences subject to impeachment are not all stated as accurately as could be desired. Treason and bribery are distinctly mentioned, and can be easily defined. They are offences which, committed by government officials, have an aggravated character, from the special opportunity which position affords for the commission of such crimes. The phrase "other high crimes and misdemeanours" is of but vague significance. It may be held to include all crimes which involve a dereliction of official duty, and all misdemeanours having the same effect. Official position intensifies

an offence. It is justly held that impeachable offences include acts performed by an official, though they may not be strictly official acts.

The fourth characteristic feature of impeachment is its limitation in effect to a deprivation of present, and prohibition of future, office. The purpose and intent of impeachment as thus constituted may reasonably be inferred to be the punishment of malfeasance of office and a consequent amenability to civil tribunals, which removal from office permits. Higher governmental officials have an immunity from judicial process, considered essential to the dignity and efficiency of office. A consequence of conviction in impeachment is a removal of this immunity. It is essential, in order to avoid the abuse of the power of impeachment, that the offence of which it takes cognisance should be stated with sufficient accuracy to remove it from questions of mere political conduct and policy; otherwise the legislature would have undue control over the executive in case of differences between the two departments. By adding to the specific crimes of treason and bribery "other high crimes and misdemeanours," the Constitution limits the action of impeachment to actual crimes and misdemeanours committed while in office, and thus specially exempts it from jurisdiction over possible errors of judgment in political actions.

In ministerial governments the relations between the chief executive and the ministry provide something in the nature of a council. The Constitution of The United States tacitly assumes as incidental to governmental operations executive departments with a chief head in each. It permits the President to "require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." In contemporaneous exposition this clause has been treated as a redundancy, holding that the right would naturally exist without special

permit or injunction. The phrase, however, seems well chosen to indicate the mere advisory quality of executive chiefs of departments, and the absence of the directing power of a council, which is inconsistent with the unity and irresponsibility of a sole executive.

Executive powers cannot in any Constitution be defined with absolute precision. They are, like the whole province of government, divisible into the two offices of maintaining laws and of doing public works. They reach from the larger office of suppression of rebellion and the conduct of international war to the minor office of public safety and comfort, under the vague authority of what is called the police power, subject always to the correcting influence of a well-established judiciary.

The chief office of the judiciary, in political matters, is the restraining of other governmental departments within their Constitutional limits. In civil matters, it serves as a restriction of individuals within the rules of law. The chief requisite to these two prominent functions is independence—a freedom from influence either from departments or from persons. This freedom could not be assured if its creation and regulation should be by legislative acts. In a very enlarged sense, the judiciary comes within the sphere of Constitutional provision. To accomplish its manifest purpose and to insure its efficiency, certain distinctive features should appear, as the jurisdiction of the court, the mode of selecting judges, their tenure of office, their compensation, and the methods of removal.

There can be little doubt that, excepting in the case of a specially constituted and limited electorate, the mode of election is not favourable to efficiency or highness of purpose in the judicial office. This is a professional and scientific department, and demands qualifications which people in general are not well fitted to decide. The propriety of intrusting selection of judicial officers to those who by training and experience are able to judge

of professional qualification is manifest. This ability is most likely to be found in those occupying the higher positions in political life. The power of appointment is usually conceded to the chief executive, frequently subject to the approval of some political body. This method would seem to furnish security for satisfactory appointment.

The length of term of office has a bearing upon its efficiency. If fixed for the life of the incumbent or for a long period, it enables the incumbent to forego the profits of other professional branches, to expect an assured support, and to acquire experience essential to thorough administration of office. Thus guarded, the judicial office attracts the highest professional talent, which cannot be tempted by mere ephemeral glory. Assurance of competency is afforded by judicious and intelligent appointment. A power of removal, applying to the judiciary as well as to other officials, protects against abuse of office. The compensation naturally should be adequate to the reward of services of the quality which the office demands. It is obviously impracticable, if the term of office is for a long period, to establish Constitutionally a fixed salary, for a constant sum does not constitute a constant value. This is within the legislative province.

The chief duty of the judiciary is to determine the rights of persons by the system of jurisprudence of a particular State. But where there is an established Constitution, the office may be much extended. If it is assumed that in the absence of Constitutional restriction the legislature is supreme, a judicial department can only construe and apply legislative enactments, or at least is not at liberty to controvert any such enactments on the ground that they may be at variance with a just conception of human rights. This is a question which undoubtedly should influence legislative action, but is at the same

time a question of so general a character that its application by the judicature in correction of such action would be difficult and impolitic. A fixed Constitution interposes as a barrier against legislative infringement of human rights. Such a barrier would be inefficient if there were not sufficient means of protection against being overridden, and the protection may be afforded by a power residing in the judicial department to decide as to the Constitutionality of any legislative enactment. Here is a very enlarged and important jurisdiction. A Constitution would be futile if its restraining influence were limited to moral effect or public opinion. There is needed also an interpreter of Constitutional provisions and of their mode of application. This is the appropriate office of the judicial department—the office of construing the Constitution, of applying its provisions to a particular question, and of formulating decrees to be enforced by the legitimate executive organs. The United States Constitution in general terms gives judicial jurisdiction not only to laws of The United States, but also "to all cases in law and equity arising under the Constitution."

In creating a judicial department, a Constitution endeavours to give it efficiency, dignity, and sufficient power by prescribing qualifications for judicial office, length of term, compensation, jurisdiction, and removal for unfitness. It endeavours also to secure independence, its most vital characteristic, by guarding against possibility of oppression by the other departments. Executive influence may be exerted through the power of appointment; but this influence may be reduced by the required co-operation of some other department, and by a long term of judicial office, particularly if the judicial term exceeds the executive term in duration. Legislative control may be exerted by regulation of compensation, and by whatever authority as to the organisation of

courts may be left to legislative action. This may be restricted as to such matters as may personally influence the incumbent in office. The Constitution of The United States has, while giving legislative power to fix compensation of judicial office, prohibited its diminution during an official term.

The constructive feature of a Constitution naturally deals more with organisation and methods than with powers. In a federate system the relative authority of the federal rule and that of its component parts may be differentiated. But the powers of the State are co-extensive with the purpose for which government in a State is created. This purpose may be defined and limited. To guard against excess of governmental power beyond the end for which the State exists, limitations are to be applied; and herein appears the restrictive feature of the Constitution.

## CHAPTER VII

### CONSTITUTIONS—RESTRICTIVE

ALL history is a story of conflict between many opposing forces. But in history of governments the conflict is limited, in the main, to two opposing forces. The ruling power seeks to maintain or to increase itself. The people endeavour to assert their rights. Between these two the battle of political civilisation is fought. In modern history, from which we learn most of our valuable political lessons, we observe that monarchy, built upon the decadence of the feudal system, substituted the rule of the one for the tyranny of the many; and this is supposed to be a distinct advance. But monarchy, when established, seeks to increase its power, and this effort in time meets resistance. Successful resistances make Constitutional landmarks, provided the reforms they effect become engrafted upon the system of the State. Many reforms are ephemeral, and make no permanent mark, excepting for their moral influence and suggestions of future progress. But improvements of political condition which are permanent, with no, or little, probability of regression, and to which the habits of thought and action of a people have become adjusted, have by these facts acquired Constitutional features. A series of such improvements in any State forms its Constitutional history, —forms in fact its Constitution, though technically they have no more force than an ordinary compact or statute. Their abiding force lies in the public recognition of their guaranty of human rights. All such provisions, val-

able as they may be, lack the completeness and precision of formulated Constitutions. They nevertheless serve as valuable guides in the construction of formulated Constitutions, by the historical test which they afford of their political operations.

The tendency of modern times, evidenced by the direction which political progress takes, is towards distinctly enumerated Constitutional forms. This progress, too, has changed the problems with which political intelligence has to contend. Former efforts have mainly been directed to the curtailment of the executive power in the State, by a corresponding increase of the legislative power. Success in this direction has altered the conditions,—and the chief power in a State now mostly resides in the legislative department. Wherever the predominating power may be, there is the possibility of abuse. The most valued office of a Constitution is to guard against this possibility. In its constructive feature it provides the methods of governmental action. In its restrictive feature it limits this action in the interest of human rights.

Sufficient mention has been made in previous pages of the purpose of government and its relation to human rights to indicate the lines on which Constitutional restrictions should operate. Much profit may be had by studying some of the principal achievements in this direction to be observed in the history of political progress. Some political reforms have so altered general conditions that the abuses they have corrected need no longer be guarded against. Many attempts at political reform have failed to acquire permanence, or their effects have been long delayed. The French parliaments, notably that of Paris, entered their protest against political abuses at various times during a period of years, and finally succumbed to royal influence. The Fronde had a short existence. The States-General waited

nearly five hundred years for an opportune moment to display its power. In England far greater stability is observed in movements of political reform. The rise of the Commons, similar in origin and effect, and not far distant in point of time from the rise of the Third Estate, developed into a permanent institution which by gradual accretion of force became the ruling power in the State. Magna Charta and the Declaration of Rights, with occasional lapses, have been a continuing force. They are to-day Constitutional muniments; they furnish the text of modern Constitutional safeguards. Various acts of the Colonial Assemblies of North America are notable instances of restrictions against governmental infringements of human rights. Less notice than it deserves has been accorded to a political document expressing sentiments more in consonance with the opinions of the present time than with the age in which they were announced. More than twenty-five years before the Declaration of Rights, and at a period when religious strife and bigotry were dominant, this clause was to be found in "Concessions and Agreements of the Proprietors of East Jersey to and with all and every the adventurers and all such as shall settle and plant there,"—an agreement between the settlers and the Lords-Proprietors: "No person shall be anyways molested, punished, disquieted, or called in question for any difference in opinion or practice in matters of religion through all the said Province; they behaving themselves peaceably and quietly and not using this liberty to licentiousness nor to the civil injury or outward disturbance of others." No better political sentiment can at any time be found than that expressed in these words, particularly in the proviso that the liberty granted shall not be abused nor interfere with equal rights of others.

Most of the monuments of political progress observed in the course of political history have been directed

against specific abuses, and towards the correction of existing and well-known errors. And these monuments serve, though in an incomplete way, to supply the place of a Constitution. But, naturally, disjointed efforts of this kind, valuable in themselves, cannot form a complete Constitutional system. The thorough protection to human rights which a Constitution is designed to afford can only be effected by a scientific instrument superior to governmental control, defining and at the same time limiting governmental power. The utility of government has been shown to be in its protection of rights against encroachments made by individuals or by aggregations of persons. The power, necessarily of a comprehensive kind, essential to this end may be perverted to the very evil it is designed to guard against. A Constitution, then, performs a dual office. It creates a system of government in the interest of human rights; by its restrictive power it guards those rights against governmental encroachments. What those rights are, how they are derived, and how modified, has been discussed in previous chapters treating of the governmental office. Precisely the same line is to be adopted in outlining the rights which a Constitution protects.

To illustrate this text, nothing better can be found than the Constitution of The United States. Its utility for this purpose is increased by a series of amendments adopted so soon after the completion of the Constitution that they may almost be held to be a part of the original instrument. While the question of the formation of a Constitution was in discussion, an objection to the instrument was offered that it did not contain a "bill of rights." To this objection answer was made that the essential features of such a bill were already to be found in the instrument, that the powers vested in the government thereby created were directly, or by direct inference, specified, and that none others were existent. The idea of federate as

distinct from national government, which seems to be involved in this reply and its subsequent modification, is a matter for further consideration as a topic of Constitutional interpretation. But the answer was not held to be satisfactory, as evidenced by the immediate adoption of amendments containing the substance of a bill of rights. It is fortunate that this idea prevailed, otherwise the government then created would have been unfitted for the functions which it has since been called on to perform.

In the earlier history of Constitutional progress the limitations of governmental power were evidences of the making of Constitutional history. They were not so much a prohibition of undue extension of existing powers, as an absolute denial of such powers. Happily such efforts are rarely needed in the present age, as the legitimate sphere of government can be determined according to settled principles of Political Science. Constitutional limitations of governmental power need now to be directed against unwise extension of authority Constitutionally granted, and in restraint of the power which is incidental to the government of a State. The rights which the State is ordained to protect, the State should not infringe. The restriction may thus follow the line of the enumeration.

It is to be conceded that while the rights both of human life and of personal liberty are to be protected, yet they both may under certain circumstances be forfeited to the State. Still, the conditions on which the exacting of a penalty involving such important rights is founded must be stated and predetermined with as much accuracy as the general nature of Constitutional provisions will permit. There is here no question of mere arbitrary power. It is one of the necessary functions of government to determine what may be constituted crimes against the State and against the citizens of a State, in the interest of the general safety; to fix the punishment

for such offences; and to administer such punishment. By so doing it may be that the right of life or of liberty, otherwise intangible, may be infringed. This is the exercise of a legal power; but a legal power may be exercised in a manner inconsistent with abstract justice. If it is assumed, as it must be assumed in every properly constituted State, that life and liberty are to be held secure, excepting as an atonement for an offence against the public welfare, the possibility of unjust application of the exception is apparent. The offence may not be accurately described, or may be greatly exaggerated; the penalty may exceed the gravity of the crime; the methods of determining essential facts may be faulty; finally the mode of administering punishment or enforcing a penalty may be out of accord with the dictates of mercy. These errors may follow in the train of a general legal power.

It is, of course, impracticable for a Constitution to define all the crimes committable. That is the comprehensive office of jurisprudence. But some main principles of criminal law can be Constitutionally stated. The crime of treason is one susceptible of Constitutional delineation. It is a political offence, and involves an attempted reduction of governmental powers. An enlarged definition of the crime of treason, making it comprehend acts which are solely a legitimate criticism of governmental actions, is a simple and easy method of arbitrary rule to increase or to extend its authority. Here a Constitutional limitation is pertinent and justifiable. In the history of States abundant evidence is to be found of attempts at arbitrary power through the legal means of enlarging and construing the crime of treason. When not limited to acts but also extended to the use of words, constructive treason severely punished can silence opposition to an extreme of governmental misrule. The Constitution of The United States provides that treason shall consist only in levying war against The United States or in

adhering to their enemies, giving them aid and comfort. The essence of this restriction is to be found in the fact that treason cannot exist except in the presence of actual war or insurrection against the State.

There seems to be here a large protection to the individual, and perhaps too slight a protection to the State, against the inception of treasonable attempts. Apparently, also, acts only, and not incitement to acts, are subject to punishment. Still there is a certain latitude of construction in the clause prohibiting the giving aid and comfort to the enemies of the State. This clause is sufficiently general to include substantial and definite assistance of whatever kind. With the provision limiting treason to actual war against the State, or assistance rendered in an existing war, in whatever way that assistance may be rendered, sufficient security against governmental aggression seems to be afforded. The evidence for the conviction of treason is confined to the testimony of two witnesses to the same overt act, or to confession in open court. What particular meaning is to be attached to the word "overt" may be inferred from the above view of the nature of the crime as Constitutionally defined. The punishment of this highest of crimes needs not to be defined except to guard against severity not reasonably to be expected in most States; yet it is of the highest moment to protect by Constitutional provision against the former mode of extending punishment beyond the life of the criminal to his innocent descendants. "No attainer of treason shall work corruption of blood or forfeiture except during the life of the person attainted." These are the words of the Constitution of The United States.

It is easily possible in the discussion of crimes to distinguish and separate treason from all other crimes. It has the distinguishing feature of being a crime directly against the body of the State, and of being the one

crime, by the declaration, the proof, and the punishment of which the ruling power in the State may secure its own aggrandisement. Hence the special fitness of Constitutional guaranties against abuse. In other matters the rulers of the State may act to the detriment of the individual, influenced not by desire for increase of power but by ignorance of just methods of administration or by indifference to personal rights.

*Habeas corpus* has for many years been considered the Anglo-Saxon bulwark against all encroachment by the powers that be upon the life and liberty of individuals. It acts by immediate reference to the courts of all questions as to the legality of arrests and the charges upon which they are founded. The supreme importance of this direct method of protection against illegal imprisonment is fully recognised by the clause which provides that “the privilege of the writ of *habeas corpus* shall not be suspended, unless where in cases of rebellion or invasion the public safety may require it.” The exception here mentioned may seem somewhat dangerous. A discretion is permitted as to the emergency which demands the suspension,—but to whom is the exercise of this discretion granted? A peculiarity of the writ of *habeas corpus* is the great latitude allowed in the application for the writ, and the power which resides in the courts of determining the legality of a commitment. If the mere question of legality were at issue, there might be much embarrassment to the governing powers in times of warfare within a country by constant applications, or perhaps by unwise or biased interpretations of the law of arrests. But the Constitutional provision evidently means more than this. It implies that for the time being the operation of the laws for the security against arrest by the governmental power are non-existent. It would be well to define both at what times and to whom a right of this extreme nature is to be granted. The circumstances are

defined to be the presence of a conflict within the bounds of the State when opportunities for the interference with the operations of war are easily afforded. To whom the power of suspension of the writ may safely be granted becomes, in the absence of distinct Constitutional direction, a matter of inference. It is in time of war and conflict that the executive power finds the chance for its aggrandisement, and the right to increase its power by the abolishment of the safeguards against infringement of personal liberty is an effective method. Whatever addition to power may at times be needful to the protection of the State evidently should not be at the discretion of the department which benefits by the addition. The proceedings in *habeas corpus* are also of legislative regulation, though Constitutionally protected. It seems a proper assumption that the suspension of the ordinary judicial proceedings, the effect of which is to add to executive power, should lie in the hands of the legislative body, which is, more nearly than any other, the representative of the people, when ordinary rights are temporarily in abeyance.

There is to be found in political history plenty of evidence of gross abuses effected through bills of attainder and *ex post facto* laws to justify Constitutional restriction as to their use. We learn by the past to avoid future errors. It would seem unnecessary in an enlightened age to guard against such gross abuses. In the ordinary course of events such precaution would not be required. But it is to be remembered that evils not to be apprehended in the ordinary course of governmental action may appear when in times of danger to the State the passions as well as the fears of the rulers are excited.

Both personal liberty and the right of property, which are specially under the guardianship of the judicial department, are also to be protected against unwise and unfair methods of judicial administration. A person

shall not be subject, for the same offence, to be twice put in jeopardy of life or limb; shall not be compelled in any criminal case to be a witness against himself; shall be held to answer for a capital or otherwise infamous crime only on presentment or indictment of a grand jury, excepting when in the military service; and when so held, shall be entitled to a speedy and public trial by a jury of the vicinage, shall be informed of the cause of the accusation, be confronted with opposing witnesses, shall have compulsory process for obtaining witnesses in his favour, and shall have the assistance of counsel for his defence. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Warrants against persons or property must be supported by oath or affirmation, and must particularly describe both the place to be searched and the person to be seized. Trial by jury is required also in suits at common law, excepting in small causes. Private property is not to be taken for public use, without just compensation. And, in general, no person shall be deprived of life, liberty, or property, without "due process of law."

Here is quite a long enumeration of provisions looking to the just and equitable administration of justice and to the protection which the judicial department shall afford against errors of the other governmental departments. The precautions here stated were the direct product of the observations made by the designers of the Constitution and their advisers during the struggle for civil and political liberty in progress for a long series of years. The particular faults against which these precautions are directed had at some time been in evidence; and, judging by this fact, there was reason to fear that they might be repeated unless averted by effective prohibition. The chief abuses which history had displayed were committed by the executive assisted by a corrupt judiciary. The legislative body in British history, the one with which

the Constitution's creators were most familiar, had constantly endeavoured to restrict the authority of the executive, and to increase its own power; in this direction it had been acting in the interest of the people. Naturally, then, the restrictive provisions are mainly directed to the curbing of executive authority, to the regulation of judicial proceedings, and to enlargement of both legislative and personal expression of opinion. Accordingly, the provisions above mentioned are found to tend to these two classes of effects. The executive influence upon, and control over, the military forces is limited by a restriction of appropriations for army support to a period of two years. In security against judicial abuse the time-honoured trial by jury is given a most conspicuous place. The commendation which this mode of trial has received is justified by the important service it has performed in the protection of personal rights. It may, however, be a question whether or not it now fully serves that purpose, or to such a degree as to make it a fit subject of Constitutional provision, at least if Constitutional construction requires the retention of the system in its entirety. The clause that no person shall be deprived of life, liberty, or property without due process of law establishes a very general and salutary principle. It embodies the two ideas, of the prevalence and imperativeness of a legal system, and the universal applicability of that system. But it cannot be construed to go any further and to describe any particular system. It aims at the security of the individual against a disregard by any of the governmental departments of an established rule of law as designed and formulated by the State. It does not lie within Constitutional jurisdiction to prescribe a particular system of jurisprudence.

The right of religious observance is acknowledged by the prohibition against establishment of a national religion and against preventing a free exercise of religious

rights. It is fair to assume that an established religion grants certain privileges to those who are its followers; at least this is the natural tendency of such an institution. To that extent, then, there is not an equality of religious freedom. Another objection to such an establishment lies in its necessary close association with the government of the State, possibly impeding or disturbing the natural performance of its functions. The prohibition against imposing a restraint upon the free exercise of religion is of a more general character,—too general, in fact. If accepted without limitation, it would assure protection to observances and systems to which the name religion in its most enlarged significance may be applied, and this very general significance of the term must be admitted. It is not permissible to exclude from the comprehension of the term those systems which do not receive the approbation of the larger part of the people composing the State. Such a one, right or wrong as we may conceive it, may be to its followers as real and as strong a binding tie as those which receive a more general acceptance. Nevertheless, the Constitutional provision must be limited. It cannot sanction and uphold such religions as violate the accepted moral law, or conflict with the settled rule of the State, or whose tenets demand of its people a mode of life which may antagonise that maintained by the mass of the people within the jurisdiction of the State. With such limitations the Constitutional rule may be effective.

With the same article are two other Constitutional denials, one directed against abridgment of freedom of speech and of the press, the next against prohibition of the right of the people peaceably to assemble and to petition the government for a redress of grievance. Here, likewise, there is a necessary limitation. Freedom of speech and of writing must, like all human actions, be modified in the interest of the general welfare. Abso-

lute licence may be destructive of individual right or of the integrity of the State. Such provisions must be viewed as to their purpose and their efficiency. Their purpose has been to guard against the excessive action of State power, not to nullify the just rules of jurisprudence. The right peaceably to assemble and to petition the government for a redress of grievance is a valuable safeguard and corrective. It establishes a proper connection between the governors and the governed. The word "peaceably" signifies the just limitations of the right.

These illustrations from the Constitution of The United States show the spirit in which Constitutions may and should operate to guard human rights against governmental encroachments. They act in the interest of life, liberty, and property. They are directed against possible abuses in either of the three governmental departments. But there must be an enlightened construction to guide their operation. Necessarily expressed in general terms, there is the danger of inexactness on the one hand, and of too extreme comprehensiveness on the other. Their efficiency will depend on a just interpretation of, and a harmony with, the principles on which the whole governmental system is founded. Important as is the constructive department of a Constitution, it is not more so than the restrictive part, for there is always in government, of whatever character, a tendency to abuse of functions or a diversion of purpose.

In its inception the Constitution of The United States favoured the federate idea; but a generality of expression and a latitude of construction permitted a more liberal notion of nationality, and the course of events has made that idea imperative. If the language of the Constitution had been more precise and a strict construction had prevailed, there would now appear a lack of fitness between extreme Constitutional limitations and the

enlarged nationality which modern conditions demand. The prevalence of what we may term the federate idea or an opposition to a centralised authority indicated the fears which at the time were living realities—fears which political history justified. The danger then apprehended has ceased to exist or is diminished in force, and the course of events leads to an apprehension of consequences of an entirely opposite nature. Wherever the representative system exists—and it is very general, and is spreading throughout the civilised world,—it carries with it two naturally opposing conditions: diminution of executive, and increase of legislative, authority. This course may be observed in a marked degree in Great Britain, where the whole power of the government tends more and more to legislative domination. The French Constitution legalises this idea. Throughout Europe a constant effort for legislative aggrandisement is apparent. In The United States the same tendency appears, but it is restricted in a measure by Constitutional provisions. Modern opinion justly regards the representative system as the one from which the best political effects are to be expected; but we cannot fail to note that the extinction of executive absolutism is likely to be followed by legislative absolutism.

As has been shown by reference to the restrictive features of The United States Constitution, the abuse of acknowledged rights on the part of either of the governmental departments can be prevented by Constitutional provisions. But the increase of legislative power renders possible an infringement of rights which cannot directly be guarded against. Legislative functions are necessarily of a very general and comprehensive nature. It is easy to conceive that while strictly within its legal limits a legislative body may in effect violate just rights. Such a body exists for the distinct purpose of acting for the general welfare of the community. Strong partisanship,

an extreme demagogism in the interest of a class, or from motives of direct personal interest, may induce the passage of measures which do not advance the general welfare, or are directly in derogation thereof. Faults of this nature may not come within any restrictive clause, but may nevertheless be a violation of what we may term "the spirit of the Constitution." This phrase rightly construed is a living principle, to be found in the purpose and design of a Constitutional creation. What fulfils that purpose is in accord with, what fails of that purpose is opposed to, this spirit. We have here a question of method of interpretation. Not all governmental powers are distinctly enumerated. From the nature of the case they cannot be; but they may follow as a necessary and direct consequence from others which have been set forth, and may be essential to give the former effect. Here are two rules of interpretation. Is the power in question necessary to give effect to a distinctly granted power? Is it administered in accord with the purpose for which a power was granted? A failure in the latter particular is an error most liable to occur and most difficult to correct. Whether or not a tribunal whose duty it is to determine the Constitutionality of an act will be guided by the question of its conformity to the purpose of a granted authority, whether it will follow "the letter which killeth or the spirit which giveth life," is a question which either permits or prohibits the enlightened and beneficent operations of governmental powers Constitutionally created. Exactness in interpretation is desirable, but not always possible. Something of latitude of construction there must be. In many cases it is the spirit of the Constitution alone which can point out the construction.

The new conditions which modern Constitutions have to regard suggest one of the most vital features of a Constitution, the power of amendment. It is destructive as to a part, preservative as to the whole. Without that

power, neither a corrective of what experience has taught to be defects nor fitness to changed conditions would be possible. Adaptation is essential to vitality.

All forms of government, especially modern forms, are subject to a certain peril of disintegration, arising either from the ambitions of a comparatively small body of individuals or the discontent of a class on the one hand, on the other hand from the vigorous action of the people in protest against errors and abuses too long continued. These two forms of revolutions differ greatly in character, and are to be differently encountered. Against the former type of revolutionary movement superior force alone can protect. It is not amenable to any other resistance. This form has been a very frequent one in history and is liable to arise under any kind of government, though logically its strength should be least in the more liberal and popular form of government. Perhaps the most dangerous kind of revolution is when the two forms are allied,—when ruthless ambition fosters and at the same time directs more or less enlarged popular discontent. The revolution built upon the existence of governmental faults which cannot be otherwise corrected, is entitled to sympathy proportioned to the justness of the cause. But a remedy of this violent nature may entail a misery greater than that produced by the disease it is designed to remedy. It should be within the province of modern Constitutions to avert this unsatisfactory remedy by providing a method whereby causes of discontent may be legally investigated, errors which are found to be such may be corrected, the obsolete may be dropped, and approved changes may be effected. By such legitimate methods revolutionary movements may be robbed of excuse, and their real motives be exposed.

Constitutions, in their nature permanent and of a sanction superior to legislative enactments, should not lightly be disturbed. The difficulties necessarily incident to the

reformation of any Constitution impose the need of much care and deliberation in the original creation. Written Constitutions only can provide requisite methods of change. Some of them do not sufficiently guard such important actions as Constitutional changes. It would be impossible arbitrarily to prefigure methods of amendment. As in all political matters, the character of a people and fitness of means to an end must be considered. From carefully prepared Constitutions order and system may be expected; from carefully secured methods of amendment a necessary corrective and a fitness to new conditions may be attained. Thus human rights, based on sound ethical principles, may, in the social condition, be fairly well assured.

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